No. 18-___

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

PARTIES TO THE PROCEEDING

Edward G. McDonough, petitioner on review, was the plaintiff-appellant below.

Youel Smith, individually and as Special District Attorney for the County of Rensselaer, New York, AKA Trey Smith, respondent on review, was the defendant-appellee below.

John J. Ogden, Richard McNally Jr., Kevin McGrath, Alan Robillard, County of Rensselaer, John F. Brown, William A. McInerney, Kevin F. O'Malley, Daniel B. Brown, and Anthony J. Renna were defendants below, but are not parties to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Edward G. McDonough respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is reported at 898 F.3d 259. Pet. App. 1a-19a. The District Court's opinions are not reported. *Id.* at 20a-84a, 85a-135a. The Second Circuit's order denying rehearing en banc is not reported. *Id.* at 136a-137a.

JURISDICTION

The Second Circuit entered judgment on August 3, 2018. Petitioner filed a timely petition for rehearing en banc, which was denied on September 12, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

The Due Process Clause of the Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment, U.S. Const. amend. VI, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

> favor, and to have the Assistance of Counsel for his defence.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * .

INTRODUCTION

Petitioner Edward McDonough twice stood trial—and was ultimately acquitted—on dozens of criminal charges based on fabricated evidence. Much of the evidence was fabricated by Respondent Youel Smith, the prosecutor in McDonough's case, who forged witness affidavits in a pre-trial investigation and falsified other evidence used in grand jury proceedings and at trial. A Federal Bureau of Investigation inquiry uncovered Smith's malfeasance, and McDonough was finally cleared of all charges after a

years-long ordeal. McDonough subsequently filed this Section 1983 suit against Smith and other defendants. McDonough's suit was filed within three years of his acquittal, but more than three years from when (according to the Second Circuit) he would have first found out that fabricated evidence was being used against him. The issue in this case—which has divided seven circuits—is whether McDonough's suit is timely.

The majority rule, adopted by five courts of appeals, is that the statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run when the criminal proceedings terminate in the defendant's favor. *See Floyd* v. *Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano* v. *Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King* v. *Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008).

The Third, Fifth, Sixth, Ninth, and Tenth Circuits reached that conclusion by applying this Court's precedents in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and *Wallace* v. *Kato*, 549 U.S. 384 (2007). In those cases, the Court explained that for Section 1983 claims analogous to the common law tort of malicious prosecution—as McDonough's fabrication of evidence claims are here—the statute of limitations does not begin to run until criminal proceedings terminate in the defendant's favor. *See Heck*, 512 U.S. at 483-487; *see also Wallace*, 549 U.S. at 388-390. In addition, the Seventh Circuit has held that when a criminal defendant's constitutional rights are

violated, the statute of limitations does not begin to run until the constitutional violation ends. *See Manuel* v. *City of Joliet*, 903 F.3d 667, 669-670 (7th Cir. 2018) ("*Manuel II*"). In McDonough's case, that did not occur until his acquittal. If McDonough had filed this Section 1983 suit in any of these six circuits, it would have been timely.

Not so in the Second Circuit. Breaking with the majority of courts, the Second Circuit in its decision below adopted a new rule. The court acknowledged that other circuits have held that the "fabrication cause of action accrues only after criminal proceedings have terminated." Pet. App. 12a. The court stated, however, that it "disagree[d] with those decisions." *Id.* at 13a. According to the court, the "injury for this constitutional violation occurs at the time the evidence is used against the defendant," and the statute of limitations begins to run when the criminal defendant first "becomes aware of [the] tainted evidence and its improper use." *Id.* Applying that new rule in McDonough's case, the Second Circuit held that McDonough should have known of the fabricated evidence by the end of his first trial, and that McDonough's Section 1983 suit was thus untimely. *See id.*

This Court's intervention is urgently needed. As it currently stands, nothing more than geography dictates when the statute of limitations begins to run for a Section 1983 claim alleging that a public official willfully fabricated evidence in a criminal proceeding. Worse still, the Second Circuit's position requires criminal defendants to file a civil complaint explaining why the evidence against them in an *ongoing criminal trial* is fabricated—potentially

subjecting any criminal defendant who takes the stand to cross-examination. It creates a similar problem for police officers and prosecutors, who may be forced to produce documents and submit to depositions regarding a criminal proceeding that has not yet concluded. The potential for conflicting civil and criminal judgments, moreover, poses a difficulty for courts.

The Second Circuit's ruling in this case represents a clear, acknowledged departure from six other circuits. Because the Second Circuit denied rehearing en banc, the division between the courts of appeals will persist if certiorari is not granted. This Court should accordingly grant the petition and reverse.

STATEMENT

A. Factual Background

McDonough is the former Democratic Commissioner of the Rensselaer County Board of Elections. Pet. App. 24a.[1] In 2009, an investigation uncovered that in a primary election in Troy, New York, several dozen applications for absentee ballots, as well as the absentee ballots themselves, had been falsely completed or forged. *Id.* at 24a-28a. A number of suspects were identified, including William McInerney, the Troy City Clerk who actively recruited voters for the Democratic Party in Rensselaer County, and John Brown, a Democratic member of the city coun-

[1] The facts are drawn from McDonough's complaint and the opinions below. On a motion to dismiss, the Court must "accept as true all the factual allegations in his complaint." *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 915 & n.1 (2017) ("*Manuel I*").

cil. *Id.* Because McInerney had worked on the district attorney's election campaign, a county judge appointed Smith as special prosecutor to investigate and prosecute the allegations. *Id.* at 28a.

Smith's investigation was biased. Shortly after his appointment, Smith informed McInerney and Brown that they would not be prosecuted for the ballot forgery. *Id.* at 29a. When speaking with witnesses whose absentee ballots had been falsely completed or forged, Smith showed them a photo of McInerney that was 20 years old and did not reflect his current appearance, and did not show them a photo of Brown. *Id.* at 31a. Smith also failed to interview several key witnesses with knowledge of McInerney and Brown's role in the forgery. *Id.* Smith likewise declined to investigate allegations of witness tampering. *Id.* at 32a-33a. After multiple witnesses implicated McInerney and Brown in the forgery scheme, *id.* at 100a, Smith still declined to prosecute them.

Smith took a different approach with McDonough. Smith leaked to the press that McDonough was the primary target of the investigation—even though Smith lacked probable cause to prosecute McDonough for the forgery. *Id.* at 29a, 105a. Smith interviewed McDonough repeatedly, urging him to plead guilty. *Id.* at 32a-35a. On one occasion, Smith professed animosity for McDonough's father, the Democratic Party Chair, who had "turned his back" on Smith's ambitions to run for district attorney. *Id.* at 34a (internal quotation marks omitted). When it became clear that McDonough would not plead guilty, Smith fabricated evidence implicating McDonough in the forgery.

As part of the pre-trial investigation, Smith collected affidavits from witnesses whose ballots or ballot applications had been forged. Two of those affidavits were fabricated by Smith, who presented them to the grand jury. *Id.* at 36a-37a. The witnesses whose affidavits had been fabricated later testified at trial that the signatures on their purported affidavits were not genuine. *Id.* at 37a. As the trial court stated on the record, "the first witness out of the box says there's a forged instrument that the People presented." Compl., ¶ 822, 2015 WL 9435166 (Dec. 18, 2015); *see id.* ¶¶ 816-830.

Smith also aided multiple witnesses in preparing written statements that falsely implicated McDonough in the ballot forgery. For example, six months before the grand jury was empaneled, Smith pressured Kevin McGrath, another suspect in the case, into "falsely incriminat[ing]" McDonough in a sworn statement. *Id.* ¶¶ 617-620; *see* Pet. App. 34a. Prior to trial, Smith also assisted McInerney in preparing a false statement implicating McDonough, which served as a basis upon which other witnesses fabricated their testimony. Pet. App. 65a-67a (finding that McInerney's statement was intended to influence the testimony of other witnesses and was accordingly not entitled to absolute immunity); *see also* Compl., ¶ 333.

In 2010, Smith commenced grand jury proceedings against McDonough and another defendant. Pet. App. 34a. Smith offered cooperation agreements to witnesses, who in turn falsely incriminated McDonough before the grand jury. *See id.* at 34a-36a. A police investigator working with Smith testified before the grand jury that he had reviewed

the handwriting on the forged absentee ballot applications and concluded that the handwriting came from the same person. *Id.* at 35a. The investigator later admitted at trial that his testimony before the grand jury "was not correct and a mistake." *Id.* at 35a-36a (internal quotation marks omitted).

Before the grand jury, witness Kevin O'Malley initially testified that he had been involved in the forgery, but he did not implicate McDonough. *Id.* at 36a. Smith then e-mailed O'Malley's lawyer, threatening to prosecute O'Malley and "warning that it made no sense for [O'Malley] to protect" McDonough. *Id.* (internal quotation marks omitted). O'Malley then returned to the grand jury and testified, falsely, that McDonough had told him to complete certain absentee ballot applications. *Id.* O'Malley later admitted at trial that Smith had called him at his home the night before O'Malley changed his testimony. *Id.*

McDonough was indicted by the grand jury and charged with 38 counts of felony forgery and 36 counts of felony criminal possession of a forged instrument. *Id.* McDonough moved to disqualify Smith as special prosecutor, but his motion was unsuccessful. *Id.* at 37a. In 2011, McDonough contacted the U.S. attorney's office and requested an FBI investigation of his prosecution. *Id.* at 38a. The FBI agent assigned to the case gathered sufficient evidence to implicate McInerney in the forgery scheme. *Id.* The agent also found that Smith had been untruthful when he informed police that McInerney and Brown could not be prosecuted due to insufficient evidence. *Id.* McInerney was subsequently arrested and charged with forgery. *Id.* at

39a. Smith, however, offered McInerney a cooperation agreement, and McInerney pled guilty to one felony count and was sentenced to a 90-day work order. *Id.* In exchange for his cooperation, Brown similarly pled guilty to one felony count. *Id.*

McDonough, in contrast, was tried before two juries. *Id.* at 40a-41a. At trial, several witnesses—many of whom had been given cooperation agreements by Smith—gave false testimony against McDonough. *Id.* at 40a. At McDonough's second trial, the court ordered the testimony of one of those witnesses, Anthony Renna, stricken in its entirety due to the testimony's apparent falsity. *Id.* The judge instructed Renna to immediately leave the courthouse. *Id.* McDonough's first trial ended in a mistrial. *Id.* at 5a-6a. At the end of his second trial, the jury acquitted McDonough. *Id.* at 41a.

B. Procedural History

McDonough was acquitted on December 21, 2012. *Id.* He filed this Section 1983 suit in the U.S. District Court for the Northern District of New York on December 18, 2015, less than three years later. *Id.* at 23a. The suit raises two claims. First, McDonough alleges that Smith (and others, including McInerney) violated his constitutional rights by fabricating evidence used in the criminal proceedings. *Id.* at 47a. McDonough claims that his rights were violated under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See id.* at 49a; *see also* Compl., ¶¶ 1210-1213.[2] Second, McDonough alleges

[2] This Court has not determined whether a Section 1983 claim based on fabrication of evidence arises under the Fourth, Fifth, Sixth, or Fourteenth Amendments, nor is there agree-

that Smith and others engaged in malicious prosecution. Pet. App. 47a.

The district court dismissed as untimely McDonough's Section 1983 claim based on fabrication of evidence. *Id.* at 48a-53a; *see id.* at 94a. According to the district court, the statute of limitations on that claim began to run when McDonough learned, or should have learned, of the fabricated evidence, which the district court concluded occurred well before McDonough's acquittal. Pet. App. 52a-53a. The district court permitted McDonough's malicious prosecution claim to proceed against McInerney, citing the written statement in which McInerney fabricated evidence at Smith's direction that implicated McDonough. *Id.* at 64a-69a.

The district court dismissed McDonough's malicious prosecution claim against Smith, holding that "prosecutors generally have absolute immunity from malicious prosecution claims." *Id.* at 109a. The district court noted that Smith may *not* have absolute immunity from McDonough's fabrication of evidence claim, but it did not reach that issue. *Id.* at

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ment on that issue among the courts of appeals. *See, e.g.*, *Morse* v. *Fusto*, 804 F.3d 538, 547 n.7 (2d Cir. 2015) ("[T]his Circuit has been inconsistent as to whether fabrication of evidence claims arise under the Sixth Amendment right to a fair and speedy trial, or under the due process clauses of the Fifth and Fourteenth Amendments." (alterations and internal quotation marks omitted)); *Mondragón*, 519 F.3d at 1083 ("The Supreme Court has not yet explicitly decided whether such a claim exists in these circumstances under the Fourth Amendment or the procedural component of the Due Process Clause."). McDonough accordingly raised and preserved claims under each of those constitutional provisions.

112a ("The Court acknowledges that [McDonough] has sufficiently alleged that some of Defendant Smith's actions were taken in an investigative role * * *."); *id.* at 113a-114a ("If Plaintiff's fabrication of evidence claim was timely, * * * then the distinction between investigative and prosecutorial acts would be relevant."); *see also Castellano*, 352 F.3d at 958 (Courts have "held that non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity.").

The district court entered judgment with respect to Smith under Federal Rule of Civil Procedure 54(b), certifying the dismissal of McDonough's claims against Smith for appeal. Pet. App. 4a. McDonough's claims against other parties, including McInerney, remain pending in the district court.

The Second Circuit affirmed. It "acknowledge[d]" that in other circuits, a "fabrication cause of action accrues only after criminal proceedings have terminated." *Id.* at 12a. It nevertheless "disagree[d] with those decisions." *Id.* at 13a. According to the Second Circuit, "[b]ecause the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted," the statute of limitations begins to run "when he becomes aware of [the] tainted evidence and its improper use" and "his liberty has been deprived in some way." *Id.* at 10a, 13a. The court concluded that McDonough learned of the fabricated evidence "at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented," and that "there is no dispute in this case that McDonough suffered a liberty deprivation." *Id.*

at 10a, 13a-14a.[3] The Second Circuit accordingly affirmed the district court's dismissal of McDonough's fabrication of evidence claim as untimely. *Id.* at 19a.[4]

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP AND ACKNOWLEDGED CIRCUIT SPLIT OVER WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN ON A SECTION 1983 FABRICATION OF EVIDENCE CLAIM.

The Second Circuit's decision creates a clear split with six other courts of appeals, as well as numerous district courts. In its opinion below, the Second Circuit held that the statute of limitations for a Section 1983 claim alleging fabrication of evidence begins to run when a criminal defendant "becomes aware of [t]he tainted evidence and its improper use." *Id.* at 13a. In stark contrast, five other courts of appeals have held that the statute of limitations begins to run only once criminal proceedings have terminated in the defendant's favor. *See Floyd*, 722 F. App'x at 114; *Castellano*, 352 F.3d at 959-960; *Mills*, 869 F.3d at 484; *Bradford*, 803 F.3d at 387-389; *Mondragón*, 519 F.3d at 1083. The Second

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[3] The district court held that McDonough suffered a liberty deprivation when he was required to appear at trial and comply with other restrictions imposed by New York law. *See* Pet. App. 57a

[4] The Second Circuit also affirmed the dismissal of McDonough's malicious prosecution claim against Smith. *See* Pet. App. 17a-19a. That ruling is not at issue in this petition.

Circuit's decision is also contrary to the position of the Seventh Circuit, which holds that the statute of limitations begins to run on a fabrication of evidence claim when the constitutional violation ends—not when the criminal defendant notices the fabrication. *See Manuel II*, 903 F.3d at 669-670. That division of authority is outcome-determinative in this case: In every other circuit to have examined the issue, McDonough's Section 1983 claim would be timely. Given this clear split, the Court's intervention is warranted.

A. The Circuits Are Divided Over When The Statute Of Limitations Begins To Run.

1. In its decision below, the Second Circuit deliberately departed from the majority rule applied by five other circuits. The court acknowledged that "the alleged creation or use of [fabricated] evidence by both investigating officers and the prosecutor[ ] works an unacceptable corruption of the truth-seeking function of the trial process." Pet. App. 10a (internal quotation marks omitted). It held, however, that this constitutional harm occurs when the fabricated evidence is *first* used. *See id.* at 13a. Based on that reasoning, the Second Circuit concluded that the statute of limitations for a fabrication of evidence claim begins to run as soon as the criminal defendant becomes *aware* that fabricated evidence has been used against him (and his liberty has been deprived). *Id.* "For McDonough," the Second Circuit opined, "this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecution's evidence had been presented," making McDonough's Section 1983 claim untimely. *Id.* at 13a-14a.

The Second Circuit "acknowledge[d]" that in multiple other circuits, the statute of limitations for a fabrication of evidence claim begins to run "only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought." *Id.* at 12a-13a (citing *Floyd*, 722 F. App'x at 114, *Bradford*, 803 F.3d at 388-389, and *Mondragón*, 519 F.3d at 1083). The Second Circuit nevertheless chose to depart from those decisions. *Id.* at 13a. McDonough sought en banc review of the panel decision, emphasizing that the court's ruling was contrary to the position adopted by numerous other circuits. The Second Circuit nevertheless denied McDonough's petition for rehearing en banc, cementing the court's departure from the majority rule. *See id.* at 136a-137a.

The Second Circuit's position has been followed by several federal district courts. In a decision predating *Manuel II*, the U.S. District Court for the Northern District of Illinois stated that the statute of limitations on a fabrication of evidence claim begins to run "at the moment [government officials] used the fabricated evidence to deprive [the criminal defendant] of his liberty," rather than at the termination of criminal proceedings. *Lewis* v. *City of Chicago*, No. 16-CV-7592, 2017 WL 698682, at *3 (N.D. Ill. Feb. 22, 2017). Other district courts have likewise adopted the Second Circuit's position. *See, e.g.*, *Rehberg* v. *Paulk*, No. 1:07-CV-22 (WLS), 2009 WL 7772286, at *4 (M.D. Ga. Mar. 31, 2009); *Smith* v. *King*, No. 07-0268-CG-B, 2009 WL 1635757, at *5 (S.D. Ala. June 9, 2009).

2. In stark contrast with the Second Circuit, the Ninth Circuit holds that the statute of limitations for a Section 1983 claim based on fabrication of evidence does not begin to run until criminal proceedings terminate in the defendant's favor. *See Bradford*, 803 F.3d at 387-389. The Ninth Circuit based its conclusion on this Court's opinion in *Wallace*. There, the Court evaluated when the statute of limitations begins to run on a Section 1983 claim seeking damages for false arrest. *See Wallace*, 549 U.S. at 386-387. To answer that question, the Court looked to the treatment at common law of the analogous torts of false arrest and false imprisonment. *See id.* at 387-388. This Court reasoned that because the statute of limitations for those torts does not begin to run until the false imprisonment ends, the statute of limitations for an analogous Section 1983 claim similarly does not begin to run until the false imprisonment ends. *See id.* at 388-389.

Drawing on the principles enunciated in *Wallace*, the Ninth Circuit in *Bradford* held that "a court evaluates the proper accrual date for a claim by identifying the common law analogue for the § 1983 claim and applying any 'distinctive' accrual rules associated with that common law analogue." 803 F.3d at 388. In a Section 1983 suit based on fabrication of evidence, the Ninth Circuit identified the constitutional right at issue as "the right to be free from criminal charges based on a claim of deliberately fabricated evidence." *Id.* (alterations and internal quotation marks omitted). The court concluded that this right "is similar to the tort of malicious prosecution, which involves the right to be free from the use of legal process that is motivated by malice and unsupported by probable cause." *Id.*

At common law, the statute of limitations for the tort of malicious prosecution does not begin to run "until the proceedings against the plaintiff have terminated in such a manner that they cannot be revived." *Id.* (alterations and internal quotation marks omitted). The Ninth Circuit accordingly applied that same statute of limitations rule to the claim at issue in *Bradford*. The court concluded that the statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run only once the charges against the criminal defendant are "fully and finally resolved." *Id.* at 389.

The Ninth Circuit explained that its position is both legally correct and makes practical sense. As the Ninth Circuit emphasized, if a criminal defendant were required to file a Section 1983 suit *prior* to the conclusion of criminal proceedings, the public official named in the suit would almost certainly move to stay the civil proceedings while the criminal proceedings were ongoing. *See id.* at 388. In such a scenario, the public official "would not only not be prejudiced by a delay in reaching the merits, he might well have benefitted from it." *Id.*

Four other courts of appeals have adopted the rule espoused by the Ninth Circuit. In *Floyd*, the Third Circuit stated that "fabrication of evidence claims do not accrue until the criminal proceedings have terminated in [the defendant's] favor." 722 F. App'x at 114. In reaching that conclusion, the Third Circuit cited the Ninth Circuit's decision in *Bradford* for the proposition that a "claim alleging fabrication of evidence" should be treated "in the same way as [a] claim of malicious prosecution." *Id.*

The Fifth Circuit reached a similar conclusion in *Castellano*, this time relying on the Court's opinion in *Heck*. *See Castellano*, 352 F.3d at 959-960. In *Heck*, the Court emphasized that civil claims that implicate the validity of a conviction or sentence should be brought *after* criminal proceedings conclude. *See* 512 U.S. at 484-487. Citing *Heck*, the Fifth Circuit explained in *Castellano* that it had "no occasion * * * to consider afresh the federal common law footing of our insistence that a state criminal proceeding terminate in favor of a federal plaintiff complaining of constitutional deprivations suffered in a state court prosecution, a rule reflecting powerful governmental interests in finality of judgments." 352 F.3d at 959. The Fifth Circuit emphasized that "[t]he heart of [the defendant's] claim is that the prosecution obtained his arrest and conviction by use of manufactured evidence and perjured testimony." *Id.* at 959-960. Because the criminal defendant's "proof directly implicated the validity of his conviction," the Fifth Circuit concluded that the statute of limitations did not begin to run "until the case was dismissed for insufficient evidence by the state trial court." *Id.* at 360. The Fifth Circuit recently reaffirmed its position in *Winfrey* v. *Rogers*, 901 F.3d 483, 492-493 (5th Cir. 2018).

The Sixth Circuit followed suit in *Mills*, explaining that "[t]he basis of a fabrication-of-evidence claim under § 1983 is an allegation that a defendant knowingly fabricated evidence against a plaintiff, and that there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." 869 F.3d at 484 (alterations and internal quotation marks omitted). For such a claim, the Sixth Circuit held that the statute of limitations "does not begin to

run while a criminal indictment on the same charges is outstanding." *Id.* The court cited its earlier decision in *King*, which explained that "[b]ecause an element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused, the statute of limitations in such an action does not begin to run until the plaintiff knows or has reason to know of such favorable termination." 852 F.3d at 578 (internal quotation marks and citation omitted). "Were it not so," the Sixth Circuit stated in *King*, "the plaintiff would be compelled to sue during the pendency of the allegedly malicious prosecution, risking the possibility of the plaintiff's succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.* (internal quotation marks omitted). The court concluded that this result would be "in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Id.* (quoting *Heck*, 512 U.S. at 484).

In *Mondragón*, the Tenth Circuit also adopted the majority rule. *See* 519 F.3d at 1083. There, the court looked to this Court's opinion in *Wallace* to determine when a Section 1983 claim based on fabrication of evidence is timely. *See id.* at 1082-1083. The Tenth Circuit read *Wallace* as distinguishing between claims based on constitutional violations that occur *prior* to the institution of legal process, and claims based on constitutional violations that occur *after* the institution of legal process. *See id.* The court concluded that "[a]fter the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim," and the statute of limitations begins to run for such a

claim "at the earliest, when favorable termination occurs." *Id.* at 1083.

A number of federal district courts in circuits that have not addressed the question presented have similarly applied *Heck* and *Wallace* to determine when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence. Those courts have analyzed when a conviction was vacated or overturned, rather than when the criminal defendant learned of the fabrication, to determine the limitations period. *See, e.g.*, *Echavarria* v. *Roach*, No. 16-cv-11118, 2017 WL 3928270, at *6 (D. Mass. Sept. 7, 2017) (holding that statute of limitations on fabrication of evidence claim began to run when plaintiff's motion for a new trial was granted); *Gates* v. *District of Columbia*, 66 F. Supp. 3d 1, 27 (D.D.C. 2014) (holding that statute of limitations for fabrication of evidence claim did not begin to run "until the court vacated [the defendant's] conviction"); *Taylor* v. *Deaver*, No. 5:11-CV-341-H, 2012 WL 12905868, at *6 (E.D.N.C. Sept. 28, 2012) (similar).

The Third, Fifth, Sixth, Ninth, and Tenth Circuits thus all reach the same conclusion: The statute of limitations for a Section 1983 claim based on fabrication of evidence begins to run only once criminal proceedings have terminated in the defendant's favor. The Second Circuit, in contrast, holds that the statute of limitations begins to run once the defendant finds out (or should have found out) about the fabrication. The district courts are likewise divided. This Court should grant certiorari to resolve the clear, acknowledged split. *See, e.g.*, *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 917 (2017) ("*Manuel I*") (grant-

ing certiorari to correct "outlier" position of Seventh Circuit in Section 1983 case).

4. In addition to creating a clear split with five other circuits, the Second Circuit's decision also departs from the statute of limitations rule applied by *eleven* circuits in Section 1983 cases alleging a constitutional violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). In a *Brady* case, the issue is whether a public official has withheld exculpatory evidence, a claim akin to the fabrication of evidence claim at issue in this case. Although the courts of appeals are divided over the precise statute of limitations rule to apply in *Brady* cases, *none* of those courts has held that the statute of limitations begins to run as soon as the criminal defendant discovers that exculpatory evidence has been withheld. *See* Pet. at 6-7, *Carpenter* v. *Jordan*, No. 18-73 (July 11, 2018) (response requested on Sept. 7, 2018) (describing different approaches).

In crafting a new statute of limitations rule in this case, the Second Circuit accordingly departed not only from the rule applied by a majority of circuits in fabrication of evidence cases, but also from the rule applied by courts in *Brady* cases. The fundamental constitutional rights at stake in both situations—including the right to a fair trial and due process of law—are similar. *See Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."). For this reason as well, the Court should grant certiorari to address when the statute of limitations begins to run in a fabrication of evidence suit.

B. The Circuits Are Divided Over Whether The Statute Of Limitations Begins To Run Afresh Each Day A Criminal Defendant's Rights Are Violated.

This case also presents one other split. In *Manuel I*, this Court evaluated a Section 1983 claim brought by a criminal defendant who had been arrested and detained prior to trial based on fabricated evidence. *See* 137 S. Ct. at 914-916. After concluding that the defendant's claims were cognizable under the Fourth Amendment, this Court left open whether the statute of limitations began to run afresh each day that the defendant's constitutional rights were violated. *See id.* at 921-922 (citing *Albright* v. *Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J., concurring) ("The time to file the § 1983 action should begin to run not at the start, but at the end of the episode in suit, *i.e.*, upon dismissal of the criminal charges * * *.")).

On remand in *Manuel II*, the Seventh Circuit addressed that issue. It held that "[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends." 903 F.3d at 669. Thus, the court concluded that "[t]he wrong of detention without probable cause continues for the duration of the detention," and that the statute of limitations accordingly begins to run "when the detention ends." *Id.* at 670. The Seventh Circuit allowed the criminal defendant's Section 1983 suit based on fabrication of evidence to go forward on that basis. *See id.*

The Second Circuit adopted the opposite approach in this case. McDonough argued below that his fabrication of evidence claim was "timely because his wrongful prosecution constituted a continuing viola-

tion, that only ceased on his acquittal." Pet. App. 16a (alterations and quotation marks omitted). The Second Circuit disagreed, holding that McDonough was instead injured each time the fabricated evidence was used, including when "Smith allegedly fabricated evidence, then presented that evidence to a grand jury, and later used it at McDonough's trials." *Id.* at 17a. Finding no continuing violation, the Second Circuit concluded that the statute of limitations began to run when McDonough *first* "became aware of the fabricated evidence, which was, at the latest, during the first trial." *Id.*

The disagreement between the Second Circuit and the Seventh Circuit is clear. In the Second Circuit, where a criminal defendant asserts that his constitutional rights (including his Fourth Amendment rights) have been violated based on fabricated evidence, the statute of limitations begins to run as soon as the defendant becomes aware that fabricated evidence has been used against him. In the Seventh Circuit, in contrast, the statute of limitations begins to run only once the constitutional violation ends. This straightforward division of authority is worthy of the Court's attention, and the Court should grant certiorari to resolve it.

II. THE DECISION BELOW IS WRONG.

The Court should also grant certiorari because the position adopted by the Second Circuit, on a grave constitutional matter, is wrong. In *Heck* and *Wallace*, this Court set forth the proper procedure for determining when the statute of limitations begins to run in a Section 1983 case. Under those precedents, a court must first identify the right at issue, and then compare that right to the most analogous tort at

common law. The statute of limitations rule governing that analogous tort then determines the statute of limitations for the Section 1983 claim. *See Heck*, 512 U.S. at 483-487; *Wallace*, 549 U.S. at 388-390. The Second Circuit never performed that crucial analysis, and it accordingly reached the wrong result in this case. Even if the Second Circuit were correct to conduct a free-floating inquiry into the constitutional rights at issue to determine when the statute of limitations begins to run, however, the Second Circuit failed to properly identify those rights. This Court has made clear that when a criminal defendant's constitutional rights are violated by the wrongful initiation and continuation of judicial process, the statute of limitations does not begin to run until the criminal proceedings end. For that reason too, McDonough's suit is timely, and this Court should reverse.

1. Applying the straightforward approach set out by this Court in *Heck* and *Wallace*, McDonough's Section 1983 suit is timely. As the Court explained in *Wallace*, a Section 1983 claim seeking damages for the violation of constitutional rights *prior* to the institution of legal process is analogous to the common law tort of false arrest or false imprisonment. *See* 549 U.S. at 389-390. "That tort provides the proper analogy" because "[t]he sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*." *Id.* at 389. At common law, the statute of limitations for the tort of false imprisonment begins to run once the false imprisonment ends. *See id.* A Section 1983 claim premised on a constitutional injury analogous to the tort of false imprisonment accordingly begins to run

when a criminal defendant's false imprisonment ends and legal process begins. *See id.*

A Section 1983 claim seeking damages for the violation of constitutional rights *after* the institution of legal process, in contrast, is analogous to the tort of malicious prosecution. *See id.* at 390. As this Court has explained, that tort "remedies detention accompanied, not by the absence of legal process, but by *wrongful institution* of legal process." *Id.* (emphasis added); *see also Heck*, 512 U.S. at 483-484. After legal process has been initiated, "any damages recoverable must be based on a malicious prosecution claim and on the *wrongful use* of judicial process rather than detention itself." *Wallace*, 549 U.S. at 390 (emphasis added and internal quotation marks omitted); *see also* Restatement (Second) of Torts § 655 (1977) (tort of malicious prosecution includes wrongfully "continuing or procuring the continuation of criminal proceedings"). At common law, the statute of limitations for the tort of malicious prosecution does not begin to run until "termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. A Section 1983 claim premised on a constitutional injury analogous to the tort of malicious prosecution accordingly begins to run only once the criminal proceedings have terminated in the defendant's favor. *See id.* at 484-487.

McDonough's Section 1983 suit does not seek damages for unlawful arrest or detention prior to the institution of legal process. It instead seeks damages for the deprivation of McDonough's Fourth, Fifth, Sixth, and Fourteenth Amendment rights *after* legal process was instituted. Whether characterized as a seizure without probable cause, a violation of due

process, or the absence of a fair trial, McDonough's claim centers on Smith's initiation and maintenance of criminal proceedings against him based on evidence that Smith *knew* to be fabricated. Because McDonough seeks damages for the period following the institution of legal process, under *Heck* and *Wallace*, his Section 1983 claim is analogous to the tort of malicious prosecution. *See, e.g.*, *Mondragón*, 519 F.3d at 1083 ("After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim."). The statute of limitations for McDonough's Section 1983 claim accordingly did not begin to run until his acquittal, when criminal proceedings indisputably terminated in his favor. *See Manuel I*, 137 S. Ct. at 920 (courts may "adopt wholesale the rules that would apply in a suit involving the most analogous tort"). McDonough filed suit within three years of that date, making his suit timely.

The Second Circuit did not identify the common law tort analogous to McDonough's fabrication of evidence claim, nor did it apply the statute of limitations rule associated with that tort. The Second Circuit accordingly erred in dismissing McDonough's Section 1983 suit as untimely.

2. Instead of applying the straightforward approach set out by this Court in *Heck* and *Wallace*, the Second Circuit stated—without citation—that "the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted." Pet. App. 13a. Working from that faulty premise, the court concluded that the statute of limitations begins to

run when the criminal defendant "becomes aware of [the] tainted evidence and its improper use." *Id.* The Second Circuit was wrong on both counts.

First, the Second Circuit erred in its characterization of the constitutional violation at issue. In *Wallace*, this Court explained that for a Section 1983 claim analogous to the tort of malicious prosecution, the constitutional injury is the "*wrongful institution* of legal process." 549 U.S. at 390. After the institution of such process, this Court explained, "any damages recoverable must be based on a malicious prosecution claim and on the *wrongful use* of judicial process." *Id.* (emphasis added and internal quotation marks omitted). This Court made a similar statement in *Heck*, where it suggested that the "gravamen" of the tort of malicious prosecution (as opposed to a complaint about abuse of process) is the "wrongfulness of the prosecution," which persists through the "lawful conclusion" of the criminal proceedings. 512 U.S. at 486 n.5.

Here, McDonough's complaint is not that Smith used fabricated evidence against him at one point in the criminal proceedings. It is that Smith wrongfully *instituted and maintained* criminal proceedings against him based on fabricated evidence, depriving McDonough of due process, a fair trial, and his liberty throughout those proceedings. That is precisely the constitutional injury identified in *Heck* and *Wallace*. As the Ninth Circuit explained in *Bradford*, a Section 1983 suit based on fabrication of evidence seeks to vindicate the "right to be free from criminal charges based on a claim of deliberately fabricated evidence," not the right to be free from a single use of such evidence. 803 F.3d at 388 (altera-

tions and internal quotation marks omitted). Because the Second Circuit misidentified the constitutional right at issue, it failed to apply the correct statute of limitations rule. *See Manuel I*, 137 S. Ct. at 921 ("[C]ourts must closely attend to the values and purposes of the constitutional right at issue."). This Court explained in *Heck* and *Wallace* that where a criminal defendant seeks to vindicate a constitutional injury analogous to the tort of malicious prosecution—as McDonough plainly does here—the statute of limitations does not begin to run until criminal proceedings terminate in the defendant's favor. *See supra* pp. 24-26.

Second, even if the Second Circuit were correct about the kind of constitutional harm at stake, it nevertheless erred in determining when the statute of limitations began to run. In its decision below, the Second Circuit relied on an earlier circuit precedent, *Veal* v. *Geraci*, 23 F.3d 722 (2d Cir. 1994), which held that the statute of limitations for a Section 1983 claim begins to run when the criminal defendant learns that his constitutional rights have been violated. *See* Pet. App. 10a-11a (citing *Veal*, 23 F.3d at 724). *Veal* in turn cited an even earlier circuit decision, *Woods v. Candela*, 13 F.3d 574 (2d Cir. 1994), which had adopted that position. *See id.* at 575-576. There is only one problem: *Woods* was granted, vacated, and remanded by this Court following its decision in *Heck*—presumably because it applied the wrong approach to calculating the statute of limitations in a Section 1983 suit. *See* 115 S. Ct. 44 (1994) (mem.).

The precedent relied on by the Second Circuit in this case is thus directly contrary to this Court's

rulings, as this Court has already concluded. *See id.* In *Heck*, this Court held that the statute of limitations for a Section 1983 claim based on the withholding of exculpatory evidence and the use of illegal trial procedures begins to run when the criminal proceedings *terminate* in the defendant's favor. *See* 512 U.S. at 486-487. Similarly, in *Wallace*, this Court held that the statute of limitations for a Section 1983 claim based on false imprisonment begins to run when the false imprisonment *ends*. *See* 549 U.S. at 389. Neither of those cases supports the Second Circuit's rule here, which pegs the statute of limitations to the criminal defendant's subjective knowledge of the violation of his constitutional rights.

3. The Second Circuit also erred when it rejected McDonough's argument that "the use of fabricated evidence against him constituted a continuing violation that renders his claim timely." Pet. App. 8a. According to the Second Circuit, "[t]he continuation of the prosecution does not, by itself, constitute a continuing violation that would postpone the running of the statute of limitations until his acquittal." *Id.* at 17a. As noted, however, this Court has expressly held that for a Section 1983 claim analogous to the tort of malicious prosecution, the constitutional injury is the "wrongful institution of legal process" and the "wrongful use of judicial process"—not the first use of fabricated evidence in a criminal proceeding. *Wallace*, 549 U.S. at 390 (emphasis and internal quotation marks omitted). In proceedings before the New York state court, McDonough was indicted and prosecuted through *two separate trials* based on evidence willfully fabricated by his prosecutor. That constitutional harm did not end the first time fabri-

cated evidence was used against him, but instead persisted throughout the criminal proceedings.

This conclusion is supported by the Seventh Circuit's decision on remand in *Manuel II*, where the court evaluated when the statute of limitations begins to run on a Section 1983 claim based on fabrication of evidence. *See* 903 F.3d at 669-670. Contrary to the approach adopted by the Second Circuit, the Seventh Circuit held that the constitutional violation in that case—the criminal defendant's detention based on a fabricated report concluding that the defendant possessed illegal drugs, when he in fact possessed vitamins—was "ongoing rather than discrete." *Id.* at 669. Because the defendant's harm was ongoing, the Seventh Circuit concluded that the statute of limitations began to run when the constitutional violation *ended*, not when the defendant found out about it. *See id.* at 669-670. Under that rule, McDonough's Section 1983 claim is plainly timely, warranting reversal.

4. Two courts of appeals—the Fifth Circuit and the Sixth Circuit—have looked to the principles enunciated in this Court's opinion in *Heck* to set the statute of limitations rule for a fabrication of evidence claim. *See Castellano*, 352 F.3d at 959-960; *Mills*, 869 F.3d at 484 (citing *King*, 852 F.3d at 579). This Court held in *Heck* that where a criminal defendant has been convicted, he cannot bring a Section 1983 claim analogous to malicious prosecution until his conviction is invalidated. *See* 512 U.S. at 486-487. The Court explained that "concerns for finality and consistency" undergirded its ruling, which was designed to "avoid[] parallel litigation over the issues of probable cause and guilt," and to "pre-

clude[ ] the possibility" of a criminal defendant "succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.* 484-485 (internal quotation marks omitted).

In *Castellano*, the Fifth Circuit relied on those principles to hold that the statute of limitations does not begin to run on a fabrication of evidence claim until criminal proceedings have terminated in the defendant's favor. *See* 352 F.3d at 959. The Fifth Circuit cited "powerful governmental interests in finality of judgments" to support its position. *Id.* In *Mills*, the Sixth Circuit likewise relied on circuit precedent emphasizing that criminal proceedings should conclude before civil suits begin in order to prevent the possibility of conflicting judgments in criminal and civil cases. *See* 869 F.3d at 484 (citing *King*, 852 F.3d at 579).

The Fifth and Sixth Circuit's opinions in *Castellano* and *Mills* demonstrate the important legal principles behind the majority rule that the statute of limitations does not begin to run on a fabrication of evidence claim until criminal proceedings terminate in the defendant's favor. The Second Circuit's position, in contrast, violates those principles. Under the Second Circuit's rule, McDonough was required to file a civil suit against Smith before the criminal proceedings terminated, raising the possibility of conflicting judgments in the civil and criminal proceedings. For that reason as well, the Second Circuit's judgment should be reversed.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is critically important. It is undisputed that the Constitution protects criminal

defendants from the willful fabrication of evidence by public officials. In order to vindicate their constitutional rights, however, criminal defendants need to know when to file suit. Public officials similarly need to understand the scope of their liability, and courts need a clear rule to determine when a suit is timely, and when it is not. This case is an ideal vehicle to address those crucial issues.

Although the Court has said that the use of fabricated evidence is a practice that the Constitution "cannot tolerate," *Miller* v. *Pate*, 386 U.S. 1, 7 (1967), fabrication remains a "disturbingly common cause of wrongful convictions." Br. of Amici Curiae the American Civil Liberties Union, Bronx Defenders, Brooklyn Defender Services, Center for Appellate Litigation, Connecticut Innocence Project, The Innocence Project, The Legal Aid Society, National Association of Criminal Defense Lawyers, Neighborhood Defender Service of Harlem, New York County Defender Services, New York State Association of Criminal Defense Lawyers, Office of the Appellate Defender, and Vermont Office of the Defender General at 1, *McDonough*, 898 F.3d 259 (No. 17-0296-cv), 2018 WL 4191173, at *1. Section 1983 suits provide a federal avenue for holding those who violate the rights of criminal defendants accountable. *See Manuel I*, 137 S. Ct. at 916; *see also City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("[T]he deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."). That is particularly important here, where Smith's actions cannot be characterized as an oversight or a mistake. Smith deliberately fabricated evidence, including witness affidavits, used in criminal proceedings against

McDonough. The statute of limitations rule adopted by this Court will determine the extent to which public officials will be held accountable for such actions.

The question presented is also of great practical importance. If this Court allows the decision below to stand, criminal defendants in the Second Circuit will in many cases be forced to file a Section 1983 suit *before* criminal proceedings have terminated. Many will be unwilling to do so, fearing that filing a civil suit will provoke prosecutors to seek greater penalties in ongoing criminal proceedings. Others will likely be counseled against filing a civil suit by their attorneys: Few lawyers would advise their client to make public statements about the evidence against them in a criminal proceeding, particularly if the client is considering testifying on their own behalf at a criminal trial. As a practical matter, the Second Circuit's statute of limitations rule is likely to deter criminal defendants from filing meritorious fabrication of evidence suits. Police officers and prosecutors may face a similar dilemma; they too could be forced in a civil suit to perform document discovery and provide depositions regarding the evidence presented in an ongoing criminal proceeding.

The rule adopted by the Second Circuit, moreover, will engender both significant uncertainty and protracted litigation. As Justice Scalia wrote, "any period of limitation is utterly meaningless without specification of the event that starts it running." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 199 (1997) (Scalia, J., concurring in part and concurring in the judgment). Under the Second Circuit's rule, it is

unclear when the statute of limitations begins to run in any particular case. The exact point at which the criminal defendant knew, or should have known, that fabricated evidence was being used against him is a question of fact that could be litigated for years before a court reaches the merits of a Section 1983 claim. That is a problem not only for criminal defendants, but also for public officials, who will be unable to calculate with certainty when their Section 1983 liability draws to a close. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014) (limitations periods "embody a policy of repose, designed to protect defendants" and foster certainty about a defendant's liability (internal quotation marks omitted)); *see also Missouri* v. *McNeely*, 569 U.S. 141, 166 (2013) (Roberts, C.J., concurring in part and dissenting in part) (advocating in favor of straightforward rules to guide public officials).

Without clear guidance, courts will similarly struggle to determine the boundaries of the limitations period. Those courts that follow the Second Circuit's approach will be forced to engage in a fact-intensive inquiry to determine when the statute of limitations started to run in each case. *Cf. Novella* v. *Westchester Cty.*, 661 F.3d 128, 148 (2d Cir. 2011) (remanding for a "fact-dependent inquiry into" when each plaintiff knew or should have known of the fact triggering the statute of limitations). In some cases, this inquiry may need to be conducted as criminal proceedings continue in state court—an outcome the Court disfavors. *See Heck*, 512 U.S. at 484 (opting for an approach that "avoids parallel litigation" in federal and state court (internal quotation marks omitted)). Meanwhile, district courts will continue to reach their own, often contradictory, conclusions in light of

the circuit divide. *Compare Taylor* v. *City of Chicago*, No. 17-cv-03642, 2018 WL 4075402, at *5-6 (N.D. Ill. Aug. 27, 2018) (following Ninth Circuit's approach), *with Lewis*, 2017 WL 698682, at *3 (employing same approach as Second Circuit).

McDonough's case presents an ideal vehicle for the Court to resolve this important issue. He raised and preserved the question presented in the district court and court of appeals. *See* Pet. App. 8a, 47a-48a. Because the circuit split arose in McDonough's case, this case provides an opportunity to correct the Second Circuit's misstep before confusion deepens. *See* SUP. CT. R. 10(a). Moreover, in the decades since this Court's decisions in *Heck* and *Wallace*, a large majority of circuits have weighed in on the issue, making further percolation unwarranted.

In sum, this case presents the right vehicle for the Court to resolve the circuits' acknowledged, intractable, and consequential dispute over when the statute of limitations begins to run in a Section 1983 suit based on fabrication of evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2018

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017
No. 17-296-cv

EDWARD G. MCDONOUGH,

Plaintiff-Appellant,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Defendant-Appellee,

JOHN J. OGDEN, RICHARD MCNALLY JR., KEVIN MCGRATH, ALAN ROBILLARD, COUNTY OF RENSSELAER, JOHN F. BROWN, WILLIAM A. MCINERNEY, KEVIN F. O'MALLEY, DANIEL B. BROWN, ANTHONY J. RENNA,

Defendants.[*]

Appeal from the United States District Court
for the Northern District of New York.
No. 15-cv-1505 — Mae A. D'Agostino, *Judge*.

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[*] The Clerk is directed to amend the caption to conform to the above.

ARGUED: NOVEMBER 29, 2017

DECIDED: AUGUST 3, 2018

Before: JACOBS, RAGGI, and DRONEY, *Circuit Judges*.

Interlocutory appeal from a judgment of the United States District Court for the Northern District of New York (D'Agostino, *J.*) dismissing the Plaintiff-Appellant's claims under 42 U.S.C. § 1983. The Plaintiff-Appellant alleged that his right to due process had been violated because fabricated evidence was used against him in state criminal proceedings. He also alleged a malicious prosecution claim against the prosecutor. We conclude that his due process claim was untimely as it was filed beyond the applicable limitations period. We also conclude that the prosecutor was entitled to absolute immunity for the malicious prosecution claim. We therefore **AFFIRM** the judgment of the district court.

BRIAN D. PREMO, Premo Law Firm PLLC, Albany, NY, *for Plaintiff-Appellant*.

THOMAS J. O'CONNOR, Napierski, VanDenburgh, Napierski & O'Connor, LLP, Albany, NY, *for Defendant-Appellee Youel Smith*.

Andrew D. Bing, Deputy Solicitor General, Jennifer L. Clark, Assistant Solicitor General, *for* Barbara D. Underwood, Attorney General

of the State of New York, *for Defendant John G. Ogden*.

DRONEY, *Circuit Judge*:

Plaintiff-Appellant Edward G. McDonough, the former Democratic Commissioner of the Rensselaer County Board of Elections, was acquitted in New York state court of forging absentee ballots in a local primary election. He appeals from two subsequent decisions of the United States District Court for the Northern District of New York (D'Agostino, *J.*) dismissing his claims against Defendant-Appellee Youel Smith under 42 U.S.C. § 1983 related to that prosecution. He alleged (1) denial of due process based on fabricated evidence and (2) malicious prosecution. The district court determined that (1) McDonough's due process claim was untimely and dismissed it as to all Defendants[1] and (2) Smith, a Special District Attorney who prosecuted McDonough, was entitled to absolute prosecutorial immunity on McDonough's malicious prosecution claim and therefore dismissed that claim with respect to Smith.[2]

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[1] The Defendants are primarily individuals allegedly associated with either the purported fraudulent scheme that formed the basis for McDonough's prosecution or members of law enforcement responsible for his investigation and prosecution. McDonough has alleged conspiracies involving both types of defendants.

[2] McDonough's claims against Smith were brought against him in his official and individual capacities. The district court dismissed the former on the basis of Eleventh Amendment immunity. That decision is not challenged in this appeal. Thus, it is only the individual capacity claims that we address.

Pursuant to Federal Rule of Civil Procedure 54(b), the district court entered judgment as to Smith and certified the decisions dismissing the two claims against him for interlocutory appeal by McDonough.[3]

For the reasons that follow, we agree with the district court's conclusion that McDonough's due process claim was untimely, and thus barred by the applicable statute of limitations. We also agree with the district court that Smith is entitled to absolute immunity as to the malicious prosecution claim. We therefore **AFFIRM** the dismissal of those claims.

BACKGROUND

During the 2009 Working Families Party primary election in the City of Troy, New York, several individuals associated with the Democratic and Working Families Parties forged signatures and provided false information on absentee ballot applications and absentee ballots in order to affect the outcome of that primary. Those individuals then submitted the forged absentee ballot applications to McDonough. McDonough, as a commissioner of the Rensselaer County elections board, was responsible for processing those applications.[4] McDonough

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[3] Defendant John J. Ogden, a New York State Police Trooper who worked with Smith as an investigator in the criminal case against McDonough, has filed a brief in this court arguing that the district court correctly concluded that McDonough's due process claim was time-barred. Although this Court previously granted Ogden's motion to intervene for the purpose of seeking a stay pending a reconsideration motion in the district court, the judgment entered by the district court under Federal Rule of Civil Procedure 54(b) and authorization for interlocutory appeal only applied to Defendant-Appellee Smith.

[4] McDonough, as the Democratic Rensselaer County Elections Commissioner, is responsible for ensuring that all qualified

approved the forged applications, but subsequently claimed he did not know that they had been falsified.

The plot to influence the primary was eventually discovered. Defendant Richard McNally, the elected District Attorney for Rensselaer County, was disqualified from the ensuing investigation because certain of those allegedly involved in the scheme had worked on his prior campaign. The state court then appointed Smith as a Special District Attorney to lead the investigation and potential prosecution. McDonough claimed that Smith then engaged in an elaborate scheme to frame McDonough for the crimes by, among other things, fabricating evidence. This alleged scheme included using forged affidavits, offering false testimony, and using faulty DNA methods for analyzing materials used in processing the ballot applications, all despite Smith knowing that McDonough was innocent.

McDonough claims that Smith presented the fabricated evidence to a grand jury. The grand jury subsequently indicted McDonough on more than three dozen state law counts of felony forgery in the second degree and a similar number of counts of felony criminal possession of a forged instrument in the second degree. *See* N.Y. Penal Law §§ 170.10, 170.25. The case against McDonough proceeded to

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voters may exercise their right to vote. *See* Board of Elections, www.rensco.com/departments/board-of-elections/ (last visited Jun. 20, 2018). Part of the responsibilities of a Board of Elections, and by extension, a Commissioner, is to receive applications for absentee ballots and determine whether the applicants are qualified to vote. N.Y. Elec. Law § 8-402(1). McDonough, as an elections commissioner, was a full-time employee of Rensselaer County.

trial but ended in a mistrial. McDonough was then retried, again with Smith as the prosecutor. That trial ended in McDonough's acquittal on December 21, 2012.

On December 18, 2015, McDonough filed this action under 42 U.S.C. § 1983, claiming that the Defendants (including Smith) (1) had violated his right to due process by fabricating evidence and later using it against him before the grand jury and in his two trials and (2) were liable for malicious prosecution.

Several Defendants filed motions to dismiss McDonough's due process claim. They argued, in part, that it was barred by the applicable three-year statute of limitations because the allegedly fabricated evidence had been disclosed to McDonough, and his claim therefore accrued, well before the second jury acquitted him.[5]

In opposing the Defendants' motions, McDonough argued that because his fabrication of evidence claim was based on the actions of Smith, a prosecutor, it was analogous to a malicious prosecution claim, and therefore did not accrue until the second trial terminated in his favor. McDonough also contended that his due process claim did not accrue until the termination of the second trial under the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477

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[5] Although Smith filed a motion to dismiss McDonough's complaint, he did not argue that McDonough's due process claim was untimely Nonetheless, the district court concluded, as other Defendants had raised untimeliness issues as to the fabrication of evidence claim, that the claim was also untimely as to Smith. Plaintiff does not challenge that Smith may assert the untimeliness of that claim in this appeal.

(1994). He argued that his fabrication of evidence claim would challenge the validity of the pending criminal proceedings against him, and thus, under *Heck*, did not accrue until he was acquitted.

In two decisions, dated September 30, 2016 and December 30, 2016, the district court dismissed McDonough's due process claims against all Defendants as untimely and his malicious prosecution claim against Smith on the basis of absolute prosecutorial immunity.[6]

As to the due process claim, the district court reasoned that McDonough's claim was "based upon the fabrication of evidence" and it "accrued when he knew or should have known that such evidence was being used against him and not upon his acquittal in his criminal case." J. App. 155. As the district court indicated, McDonough's complaint had alleged "that all of the fabricated evidence was either presented at grand jury proceedings or during his two trials, all of which occurred" more than three years before he filed suit. J. App. 156.

The district court also concluded that Smith was protected by absolute immunity as to the malicious prosecution claim.

DISCUSSION

I. Standard of Review

"We review *de novo* the grant of a motion to dismiss, accepting all factual allegations in the

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[6] The district court also determined that McDonough's malicious prosecution claim was timely because it had not accrued until his acquittal. That claim is still proceeding in the district court as to other Defendants.

complaint as true and drawing inferences from those allegations in the light most favorable to the plaintiff." *Bascunan v. Elsaca*, 874 F.3d 806, 810 (2d Cir. 2017) (alterations and internal quotation marks omitted); *see also Deutsche Bank Nat'l Tr. Co. v. Quicken Loans Inc.*, 810 F.3d 861, 865 (2d Cir. 2015) ("We review *de novo* a district court's grant of a motion to dismiss, including its legal interpretation and application of a statute of limitations . . . .").

II. The Due Process Claim

McDonough argues that his due process claim is timely because he alleged that Smith fabricated evidence in order to file baseless charges against him, and thus his claim is most analogous to a malicious prosecution action, which does not accrue until favorable termination of the prosecution, here the verdict of acquittal. *See Poventud v. City of New York*, 750 F.3d 121, 131 (2d Cir. 2014). In the alternative, McDonough asserts (1) that his claim is timely in light of *Heck v. Humphrey*, and (2) that the use of fabricated evidence against him constituted a continuing violation that renders his claim timely.

We conclude that the nature of McDonough's due process claim is different from a malicious prosecution claim, and that it accrued when (1) McDonough learned that the evidence was false and was used against him during the criminal proceedings; and (2) he suffered a loss of liberty as a result of that evidence. Because both occurred more than three years prior to McDonough filing this action, we agree with the district court that

McDonough's due process claim is time-barred.[7] We also reject McDonough's additional arguments as to the due process claim.

a. The Accrual of § 1983 Actions for Fabrication of Evidence and Malicious Prosecution

The statute of limitation for claims brought under 42 U.S.C. § 1983 is generally "the statute of limitations for the analogous claim under the law of the state where the cause of action accrued." *Spak v. Phillips*, 857 F.3d 458, 462 (2d Cir. 2017). It is undisputed that the applicable statute here is New York's three-year limitations period for personal injury claims. *See Smith v. Campbell*, 782 F.3d 93, 100 (2d Cir. 2015) (applying three-year personal injury limitations period to retaliatory prosecution claim); *see also* N.Y.C.P.L.R. § 214(5) (personal injury statute of limitations).

"However, the time at which a claim . . . under [§] 1983 accrues is a question of federal law that is *not* resolved by reference to state law." *Spak*, 857 F.3d at 462 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)) (emphasis in original). Instead, federal "courts apply general common-law tort principles to determine the accrual date of a [§] 1983 claim." *Spak*, 857 F.3d at 462 (alterations and internal quotation marks omitted). It "is the standard rule that accrual occurs when a plaintiff has a complete and present cause of action, that is,

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[7] At times, McDonough characterizes the fabrication of evidence claim against Smith as a conspiracy to fabricate evidence with other Defendants. That does not affect our conclusion as to the accrual of that claim.

when the plaintiff can file suit and obtain relief." *Smith*, 782 F.3d at 100 (internal quotation marks omitted). Put other ways, an action accrues "when the wrongful act or omission results in damages," *id.*, and "once the plaintiff knows or has reason to know of the injury which is the basis of his action," *Veal v. Geraci*, 23 F.3d 722, 724 (2d Cir. 1994) (internal quotation marks omitted).

We next consider the accrual rules for the two types of claims that McDonough has brought against Smith in this case: fabrication of evidence and malicious prosecution.

Under the Fifth and Fourteenth Amendments' Due Process Clauses, individuals have "the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer . . . ." *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000). The forwarding by an investigating officer to a prosecutor of fabricated evidence, or in this instance, the alleged creation or use of such evidence by both investigating officers and the prosecutor, "works an unacceptable 'corruption of the truth-seeking function of the trial process.'" *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)).

Applying our standard accrual rules, a fabrication of evidence claim accrues (1) when a plaintiff learns of the fabrication and it is used against him, *see Veal*, 23 F.3d at 724, and (2) his liberty has been deprived in some way, *see Zahrey*, 221 F.3d at 348. Because there is no dispute in this case that McDonough suffered a liberty deprivation because of that evidence when he was arrested and stood trial, we focus our attention on the first prong. *See id.*

The statute of limitations begins to run on a fabrication of evidence claim against law enforcement officials under § 1983 when the plaintiff has "'reason to know of the injury which is the basis of his action.'" *Veal*, 23 F.3d at 724 (quoting *Singleton v. New York*, 632 F.2d 185, 191 (2d Cir. 1980)). "The reference to 'know[ledge] of the injury' does not suggest that the statute does not begin to run until the claimant has received judicial verification that the defendants' acts were wrongful." *Id.* (second alteration in original).

In *Veal*, a police detective manipulated a lineup by arranging for the witness to view the criminal defendant (later the plaintiff in the § 1983 fabrication of evidence lawsuit) entering the police station in handcuffs prior to conducting the lineup. *Id.* at 723-24. However, at the time of the lineup, the defendant had already been arrested for the crime based on the same witness's identification of him from a prior photo array. *Id.* at 725. The evidence of the identification from the lineup was later used at trial and the defendant was convicted. *Id.* at 724. The Appellate Division of the New York Supreme Court reversed the conviction because of the use of the suggestive lineup and the resulting in-court identification. *Id.*

Veal brought his § 1983 due process claim within three years of the decision by the Appellate Division but more than three years after he had been sentenced following his trial. *Id.* We concluded that the statute of limitations had expired before the suit was instituted because Veal was made aware of the tainted lineup when its circumstances were disclosed before his trial (and he moved to suppress its use at

trial), more than three years before suit was brought. *Id.* at 724-25. The date of the reversal of the conviction by the Appellate Division was not the accrual date of the due process violation; rather it was as early as when the circumstances of the lineup were disclosed at the pretrial hearing, and certainly no later than the date of conviction and sentencing, because those later dates were when the liberty deprivation occurred based on the effect of the tainted evidence at trial. *Id.* at 725-26.[8]

We acknowledge that the Third, Ninth, and Tenth Circuits have held that the due process fabrication cause of action accrues only after criminal proceedings have terminated because those circuits have concluded that fabrication of evidence claims are analogous to claims of malicious prosecution, which require termination of the criminal proceeding in the defendant's favor before suit may be brought. *See Floyd v. Attorney Gen. of Pennsylvania*, 722 F. App'x. 112, 114 (3d Cir. Jan. 8, 2018); *Bradford v. Scherschligt*, 803 F.3d 382, 388-89 (9th Cir. 2015) ("To determine the proper date of accrual, we look to the common law tort most analogous to Bradford's claim. As we have explained, the right at issue... is the right to be free from [criminal] charges based on a claim of deliberately fabricated evidence. In this regard, it is like the tort of malicious prosecution, which involves the right to be

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[8] District courts in this Circuit have followed *Veal* and concluded that a § 1983 claim based on fabricated evidence "accrues when the plaintiff learns or should have learned that the evidence was fabricated and such conduct causes the claimant some injury." *Mitchell v. Home*, 377 F. Supp. 2d 361, 373 (S.D.N.Y. 2005)

free from the use of legal process that is motivated by malice and unsupported by probable cause.") (second alteration in original) (internal citation and quotation marks omitted); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008) ("After the institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim. . . . Because the statute of limitations does not start running before the elements of a claim are satisfied, the statute of limitations for this due process claim cannot start until the plaintiff has achieved a favorable result in the original action."). We disagree with those decisions. Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial, or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. Indeed, the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.

We thus conclude that, under the circumstances here, the § 1983 action based on fabrication of evidence accrued when McDonough (1) learned of the fabrication of the evidence and its use against him in criminal proceedings, and (2) was deprived of a liberty interest by his arrest and trial. For McDonough, this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecution's evidence

had been presented.[9] "[J]udicial verification that the defendants' acts were wrongful" is not required, and thus accrual did not have to await McDonough's acquittal. *Veal*, 23 F.3d at 724.

In contrast, we have long held that malicious prosecution claims brought pursuant to § 1983 do not accrue until the underlying criminal proceedings against the plaintiff terminate in his favor. *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010). Favorable termination is an element of malicious prosecution under New York law and also for the Constitution-based tort. *Id.* A plaintiff therefore cannot have a complete cause of action unless and until the criminal proceedings against him terminate favorably.[10] Accordingly, the district court properly concluded that the malicious prosecution claims were timely.[11]

That McDonough alleged that a prosecutor, rather than a law enforcement officer, fabricated evidence does not delay the accrual of his due process claim until accrual of his malicious prosecution claim. The

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[9] McDonough does not allege that fabricated evidence was used against him in the second trial that was not presented in the first.

[10] The elements of a malicious prosecution claim require a plaintiff to establish that "(1) the defendant initiated a prosecution against [the] plaintiff, (2) without probable cause to believe the proceeding can succeed, (3) the proceeding was begun with malice and, (4) the matter terminated in plaintiff's favor." *Ricciuti*, 124 F.3d at 130. The elements are the same for the New York tort and the constitutional one. *See id ; Colon v. City of New York*, 60. N.Y.2d 78, 82 (1983)

[11] The district court, however, concluded that Smith was entitled to absolute immunity from the malicious prosecution claim. That decision is addressed later in this opinion.

constitutional right violated by fabricated evidence is the right not to be arrested or to face trial based on such evidence. *See Zahrey*, 221 F.3d at 348. That violation and its harm were complete when the fabricated evidence was used by Smith against McDonough in those ways. It matters not, in the circumstances here, whether it was Smith or a law enforcement officer who created and used the allegedly false evidence; whoever causes that deprivation of liberty is a proper defendant for this constitutional cause of action. But the defendant's role makes no difference when the claim accrues. The separate and distinct harm that malicious prosecution claims are designed to address afforded McDonough a remedy to the extent that he alleged that fabricated evidence was created to prosecute him maliciously and without probable cause.[12] *See id.* (discussing claim based on prosecutor's fabrication of evidence).

McDonough argues that, notwithstanding its date of accrual, his due process claim is timely as a result of the Supreme Court's decision in *Heck*, 512 U.S. at 486-87 (concluding that civil complaint must be dismissed in a malicious prosecution-type case if a judgment in favor of the plaintiff would "imply the invalidity of his conviction"). That argument, however, is foreclosed by the Supreme Court's subsequent decision in *Wallace*, 549 U.S. at 393-94. In *Wallace*, the plaintiff brought a false arrest claim under § 1983. The conviction following that arrest

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[12] As one district court in this Circuit aptly explained: "A right to a fair trial claim is *distinct* from a malicious prosecution claim." *Bailey v. City of New York*, 79 F. Supp 3d 424, 446 (E.D.N.Y. 2015) (emphasis added).

was reversed by the state appeals court because the arrest was without probable cause, thus invalidating a subsequent confession admitted at trial. *Id.* at 386-87. The Supreme Court held that the civil false arrest claim accrued at the time of the initial arrest and the ultimate reversal of the conviction was not necessary to complete the false arrest constitutional tort. *Id.* at 394. Even though the false arrest claim might impugn a *future* conviction, *Heck* did not delay its accrual date, and the civil action could proceed even though the criminal case had not been resolved at that time.[13] *Id.* at 393. Thus, the Court clarified that, "the *Heck* rule for deferred accrual is called into play only when there exists a conviction or sentence that has *not* been invalidated, that is to say, an outstanding criminal judgment." *Wallace*, 549 U.S. at 393 (internal punctuation and quotation marks omitted) (emphasis in original). McDonough was never convicted, so *Heck* is not "called into play." *Id.*

Finally, McDonough argues that his due process claim is timely because his "wrongful prosecution [constituted] a continuing violation," that only ceased on his acquittal. Appellant's Br. 50. We are not persuaded. As we have explained: "Characterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as a single series of interlocking events does not postpone accrual of claims based on individual wrongful acts." *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1156 (2d

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[13] The Supreme Court in *Wallace* stated that there may be circumstances where the district court might exercise its discretion to stay the civil action until the criminal case is resolved, but that is not relevant here. *Wallace*, 594 U.S. at 393-94.

Cir. 1995) (internal quotation marks omitted). Smith allegedly fabricated evidence, then presented that evidence to a grand jury, and later used it at McDonough's trials. The cause of action accrued when McDonough became aware of the fabricated evidence, which was, at the latest, during the first trial. The continuation of the prosecution does not, by itself, constitute a continuing violation that would postpone the running of the statute of limitations until his acquittal.[14]

III. The Malicious Prosecution Claim

Prosecutors are protected by absolute immunity for their acts that are "intimately associated with the judicial phase of the criminal process" and their role as advocates, but they receive only qualified immunity for acts that are investigatory in nature. *Simon v. City of New York*, 727 F.3d 167, 171–72 (2d Cir. 2013) (internal quotation marks omitted). The district court concluded that Smith was entitled to absolute immunity from McDonough's malicious prosecution claim because even though McDonough's

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[14] We are also not persuaded by McDonough's reliance on the Supreme Court's recent decision in *Manuel v. City of Joliet, Ill.*, which held that a plaintiff (formerly a criminal defendant) may seek damages under 42 U.S.C. § 1983 concerning his pretrial detention on the ground that it violated the Fourth Amendment for the period of pretrial detention after his arrest. 137 S. Ct. 911, 914 (2017). That a claim under the Fourth Amendment may be based on events occurring after an arrest does not affect our conclusion that McDonough's due process claim accrued well before his acquittal, and the Supreme Court stated in *Manuel* that its recognition that the Fourth Amendment applies to a period after the arrest did not necessarily alter the accrual date of that and other causes of action, and left the question for the Courts of Appeals to resolve. *Id.* at 922.

complaint suggests that, at times, Smith was acting in an investigatory capacity, "the distinction between a prosecutor's investigative and prosecutorial functions is immaterial to a malicious prosecution claim, since prosecutors are generally immune from such claims." J. App. 204; *see also Shmueli v. New York*, 424 F.3d 231, 238 (2d Cir. 2005). We agree. Although prosecutors may be eligible only for qualified immunity when functioning in an investigative capacity, they are entitled to absolute immunity when acting as advocates for the state, such as initiating prosecutions or at trial. *See Zahrey*, 221 F.3d at 346 (holding, in § 1983 cases, that prosecutorial "[a]ctions taken as an advocate enjoy absolute immunity, while actions taken as an investigator enjoy only qualified immunity" (internal citation omitted)); *see also Shmueli*, 424 F.3d at 237 ("[T]he initiation and pursuit of a criminal prosecution are quintessential prosecutorial functions . . . ."). As the malicious prosecution claim relates only to Smith's prosecutorial function, it is barred by absolute immunity.[15]

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[15] McDonough also asserts on appeal that Smith's appointment as Special District Attorney was invalid under New York law and that the conduct McDonough was charged with in the indictment could not meet the elements of the various state criminal statutes. In order to strip Smith of his absolute prosecutorial immunity, McDonough would be required to show Smith proceeded despite a "clear absence of all jurisdiction" for the prosecution. *Barr v. Abrams*, 810 F 2d 358, 361 (2d Cir. 1987). He has not done so. Also, as to the claim that Smith was not properly appointed, the correct forum for such a claim would be in the New York courts. In *Working Families Party v. Fisher*, 23 N.Y.3d 539 (2014), the New York Court of Appeals held that the method for challenging the appointment of a special prosecutor is through a N.Y. C P.L.R.

CONCLUSION

McDonough's due process claim accrued when (1) the purportedly fabricated evidence was used against him and he had knowledge of that use, and (2) he was deprived of a liberty interest. Because that occurred more than three years before he filed suit, we **AFFIRM** the decision of the district court dismissing that claim. We also **AFFIRM** the decision of the district court that Smith was entitled to absolute immunity for the malicious prosecution claim.

Article 78 proceeding. McDonough did not pursue the Article 78 course to invalidate Smith's appointment. Rather, McDonough alleged in his complaint that he sought to have Smith disqualified by petitioning the County to file an action in the state courts to nullify Smith's appointment, and later filing a motion in his criminal case to dismiss the charges on the basis that Smith's appointment was unlawful. That motion was denied. As to the claim concerning the New York criminal statutes, the appropriate forum for challenging the application of the state criminal statutes to McDonough's alleged conduct was in McDonough's two state criminal trials, not during this subsequent civil action under § 1983. To the extent he argues that this should support his malicious prosecution claim, the argument does not affect Smith's absolute immunity for his prosecutorial conduct, as it is the heartland of such a protection. *See Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (holding that absolute immunity protects prosecutors for their conduct "intimately associated with the judicial phase of the criminal process . . . .").

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 1:15-cv-01505
(MAD/DJS)

EDWARD G. MCDONOUGH,

Plaintiff,

v.

YOUEL C. SMITH, III, individually and as Special District Attorney for the County of Rensselaer, New York, a/k/a TREY SMITH; RICHARD J. MCNALLY, JR., individually and as Special District Attorney for the County of Rensselaer, New York; KEVIN B. MCGRATH; JOHN F. BROWN; WILLIAM A. MCINERNEY; JOHN J. OGDEN; KEVIN F. O'MALLEY; DANIEL B., BROWN; ANTHONY J. RENNA; ALAN T. ROBILLARD; THE COUNTY OF RENSSELAER, NEW YORK,

Defendants.

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Mae A. D'Agostini, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Edward G. McDonough ("Plaintiff") commenced the instant action by filing a 174 page, 1220 paragraph complaint on December 18, 2015, asserting three causes of action pursuant to 42 U.S.C. § 1983 against eleven named defendants. *See* Dkt. No. 1. Currently before the Court are five motions to dismiss, filed separately by Defendants McInerney, O'Malley, Robillard, McNally, and jointly by John and Daniel Brown. *See* Dkt. Nos. 12, 40, 50, 56, 64. The Court will address Defendants Smith, Ogden, and the County's motions to dismiss in a subsequent order. *See* Dkt. Nos. 73, 95, 96, 97.

II. BACKGROUND[1]

Defendant Youel C. Smith III, also known as Trey Smith ("Defendant Smith"), was appointed special district attorney of Rensselaer County to prosecute alleged absentee ballot forgeries in the 2009 Troy city elections. Dkt. No. 1 at ¶¶ 24-25. Defendant Richard J. McNally, Jr. ("Defendant McNally"), at the relevant times of this action, was employed as the district attorney of Rensselaer County. *Id.* at ¶ 27. Defendant William A. McInerney was serving as Troy City Clerk and was active in the recruitment of voters for the Democratic Party in Rensselaer County. Dkt. No. 12-2 at 2. Defendant John Brown is a Democratic city councilman in Troy, New York, and his brother, Daniel, served as his campaign manager during the relevant portions of this action. *See* Dkt. No. 40-3 at 3. Defendant Kevin McGrath is the brother of a State Supreme Court Justice and is active in the Rensselaer County Democratic party. Dkt. No. 1 at ¶ 3. Defendant Kevin O'Malley is an employee at the Rensselaer County Board of Elections. *Id.* at ¶ 10. Defendant John J. Ogden is an investigator for the Rensselaer County District Attorney's office. *Id.*

At all relevant times of this action, Plaintiff was employed by Rensselaer County as a full-time Democratic Commissioner of the Rensselaer County Board of Elections (the "Board of Elections"). Dkt. No. 1 at ¶ 23. The general allegations in this case surround an alleged scheme to forge and submit false

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[1] The following factual background is taken from Plaintiffs' verified complaint. Any statements contained herein are treated merely as allegations and not as statements of fact.

applications for absentee ballots ("AAB") and then file the subsequently forged absentee ballots ("AB").

An AAB is a simple, single page document that must be signed and completed by the voter or his agent before it can be filed with the Board of Elections. *Id.* at ¶ 101. Once an AAB is completed, signed and filed, an AB and an AB envelope is mailed to the voter or to the voter's AB agent, if one is designated. *Id.* at ¶ 102. The AABs require the voter to list a reason for why he or she is eligible to vote absentee ("excuses"). *Id.* at ¶ 2.

In the summer of 2009, Defendant McGrath announced that he was running to take Democratic control of the Working Family Party ("WFP") line for the City of Troy elections. *Id.* at ¶ 51. To obtain this end, Defendant McGrath approached several people that were enrolled in the WFP, including Marc Welch and Jennifer Taylor. *Id.* at ¶ 52. Defendant McGrath allegedly had those WFP members sign an AAB without completing the remainder of the form. *Id.* at ¶ 53. Thereafter, he completed these AABs with false AB names and excuses, filed them, and obtained the AB for those voters. *Id.* at ¶ 54. After receiving the ABs, Defendant McGrath and/or others falsely voted with those ABs in forged AB envelopes. *Id.* at ¶ 56. On August 24, 2009, Defendant McGrath brought the AAB signed for by Jennifer Taylor to Plaintiff at the Board of Elections offices. *Id.* at ¶ 57. Defendant McGrath told Plaintiff the excuse to list on Ms. Taylor's AAB, and Plaintiff thereafter wrote down that excuse and filed the AAB. *Id.* at ¶ 58.

On one or more occasions prior to September 10, 2009, Defendant McInerney and Anthony DeFiglio sought to have public housing WFP residents sign

AABs without completing the application, discussing their eligibility to vote by AB, or naming an AB agent. *Id.* at ¶¶ 67-68. Defendant McInerney, Mr. DeFiglio, and Gary Galuski told some voters that signing an AAB "was a new way to vote" and that an AB would be returned to them. *Id.* at ¶ 70. Defendant McInerney, John Brown, and Dan Brown then completed these AABs with false names and excuses and filed them with the Board of Elections. *Id.* at ¶ 72. Again on September 12, 2009, Defendant McInerney, John Brown, Dan Brown, and several others had multiple WFP members in public housing sign incomplete AAB forms. *Id.* at ¶¶ 81-90.

On September 10, 2009, Defendants John or Dan Brown filed approximately thirteen false or forged AABs with the Board of Elections. *Id.* at ¶¶ 74-76. On September 14, 2009, John Brown brought approximately 35 AABs to Plaintiff at the Board of Elections for filing. *Id.* at ¶¶ 115-16. Plaintiff reviewed these AABs and discovered that thirteen of them were not completed and signed. *Id.* at ¶ 122. Plaintiff set aside five AABs that did not name an AB agent and told John Brown that the AB would be mailed directly to those voters. *Id.* at ¶ 123. John Brown then made a phone call and reported to Plaintiff that he had received the names that the voters gave as AB agents. *Id.* at ¶¶ 124-131. After this phone call, Plaintiff wrote those names on the AABs and also filled in missing excuses where John Brown told him to. *Id.* at ¶¶ 132-137. At John Brown's direction, Plaintiff delivered these ABs to Defendant McInerney. *Id.* at ¶¶ 143-145. Defendant McInerney thereafter forged each of the ABs that were delivered to him. *Id.* at ¶ 151. These ABs were

delivered by Michael LoPorto to Sarah Couch, who filed them with the Board of Elections on September 15, 2009. *Id.* at ¶¶ 156-160.

On or after September 15, 2009, Robert Mirch, who was running as a Republican for the Rensselaer County Legislature in the 2009 election, obtained the absentee voter master list summary from the Board of Elections and identified the individuals named in AABs and their agents. *Id.* at ¶ 161. A private investigator thereafter obtained affidavits from approximately 35 voters who stated that their AABs were falsely completed or forged and that their ABs were forged. *Id.* at ¶¶ 162-63. Some of these voters identified or described Defendants McGrath, McInerney, John Brown, Dan Brown, and DeFiglio as the individual who had them sign their AABs. *Id.* at ¶¶ 164-65.

On September 23, 2009, Christian Lambertsen commenced an action to invalidate the ABs filed by democratic operatives in the WFP (the "*Lambertsen* action"). *Id.* at ¶ 180. Soon thereafter, John Brown asked several individuals in the WFP, including Plaintiff, to meet him the following day to discuss the *Lambertsen* action. *Id.* at ¶¶ 184-187. The purpose of this meeting was to ask the WFP to issue a press release stating that any accusations of voter fraud were without merit. *Id.* at ¶¶ 188-90. Although Plaintiff attended this meeting, he did not know who forged the ABs. *Id.* at ¶ 192.

Shortly after the AB forgery was discovered, Defendant McInerney drove to Defendant McNally's home to ask what attorney he should hire, deliberately avoiding talking on the telephone for fear of being overheard. *Id.* at ¶ 213. Defendant

McInerney retained the attorney recommended by McNally. *Id.* at ¶ 215. Defendant McInerney allegedly threw his cell phone in the river at his attorney's advice in order to destroy evidence and evade subpoena. *Id.* at ¶ 216.

On September 28, 2009, Mirch held a press conference to ask for a federal investigation into the AB forgery. *Id.* at ¶ 222. On that same day, Defendant McNally disqualified his office from investigating or prosecuting any case related to the AB forgery. *Id.* at ¶ 229. In an off-the-record conference with County Court Judge Robert Jacon and the attorney from the *Lambertsen* action, Defendant Smith was appointed as special prosecutor for any further criminal action related to the 2009 AB forgery. *Id.* at ¶ 229. The County Court issued an order of disqualification "based on the speculation of politics and the appearance of impropriety." *Id.* at ¶ 232. Defendant McNally failed to make a formal motion for disqualification of himself or his office. *Id.* at ¶ 230. However, Plaintiff has produced a letter dated September 18, 2009, which was purportedly sent by Defendant McNally as a request for the appointment of a special prosecutor. *Id.* at ¶ 231. At the time of Defendant McNally's disqualification, only Defendant McGrath and DeFiglio were publicly named as being involved in the AB forgery. *Id.* at ¶ 236. In an affidavit dated July 7, 2011, Defendant McNally stated the following reasons for his disqualification:

"(a) McInerney had worked on his 2007 campaign; (c) [sic] *DeFiglio* had done campaign work with McInerney in the past; (d) he had contact with *James Welch* during his 2007 campaign; and, (b) [sic] he

believed that [Brandt] Caird worked on his 2007 campaign but did not know whether [Tom] Aldrich did." *Id.* at ¶ 238.

Prior to October 1, 2009, Defendant Smith allegedly told Defendants McInerney and John Brown that they would not be prosecuted for the AB forgery. *Id.* at ¶ 266. Thereafter, in late October or early November of 2009, Defendant Smith "leaked to the press" that Plaintiff was the primary target for the AB fraud prosecution. *Id.* at ¶ 267.

At an October 1, 2009 hearing for the *Lambertsen* action, testimonial and documentary evidence implicated Defendant McGrath and DeFiglio by name in the AB forgery. *Id.* at ¶ 271. After the hearing, Defendant Smith "took possession of all the falsified/forged AB documents produced or introduced into evidence." *Id.* at ¶ 270.

Defendants Smith and McNally talked about the AB forgery case after Defendant McNally disqualified himself from the matter. *Id.* at ¶ 300. Specifically, on or about "January 11, 2010, May 19, 2010 and November 2, 2010, the [New York State Police] laboratory sent McNally its DNA reports regarding AB documents at the request of [Defendant] Smith." *Id.* at ¶ 302.

Starting upon his appointment on September 28, 2009, Defendant Smith was actively engaged in the investigation for the alleged AB forgery case, including the interrogation and questioning of witnesses. *Id.* at ¶¶ 322-34. Defendant Smith requested that the New York State Police use their "new" DNA extraction methods to retrieve samples off of the forged AB envelopes. *Id.* at ¶ 328. These

reports indicated that Plaintiff's DNA was found on three of the AB envelopes. *Id.* at ¶ 329.

Plaintiff alleges that, through this investigation, Defendant Smith had sufficient evidence to prosecute Defendants McGrath, McInerney, and DeFiglio for the AB forgery. *Id.* at ¶ 335. Specifically, Defendant Smith obtained numerous forged AB documents and the testimony of more than 50 witnesses, many of whom implicated Defendant McInerney in the forgery scheme. *Id.* at ¶ 336. Rather than follow this evidence, Defendant Smith targeted Plaintiff for prosecution in the forgery case. Herein lies the alleged basis for the instant action; that the Defendants, working in concert, actively conspired to initiate a scapegoat prosecution against Plaintiff in order to shift the negative attention and criminal charges away from the other Defendants, who were all democratic party operatives. *Id.* at ¶¶ 343-45. Plaintiff contends that Defendant Smith

> pretentiously adopted and pursued a preposterous prosecution theory he knew was wrong; buried crucial testimony of DeFiglio and other witnesses; did not seek readily available evidence or the truthful cooperation of any perpetrator; accepted the self-serving incredible false assertions of many suspects implicated in the crimes; immunized or gave extraordinary favorable cooperation agreements to many suspects implicated in the crimes; purposely ignored material evidence; and fabricated false evidence against McDonough.

Id. at ¶ 345. Defendant Smith allegedly engaged in these actions in furtherance of the conspiracy to

avoid convicting Defendants McGrath, John Brown, and McInerney, when there was otherwise sufficient evidence to convict. *Id.* at ¶¶ 347-51.

B. Lack of Prosecution Against Defendants

The alleged inadequacies of Defendant Smith's investigation into the other Defendants for the AB forgery include the following; (1) the photograph shown to voters to identify Defendant McInerney was a 20 year old photo, which did not accurately reflect his current appearance; (2) photographs of Defendants John Brown, Dan Brown, and other democratic operatives were not shown to voters; (3) several key democratic party operatives, including Defendant Renna and Robert Martiniano, were not interviewed for the investigation; (4) certain witnesses were not specifically asked questions about Defendant McInerney's involvement in the AB forgery; (5) the forged AB documents purportedly signed by Defendant McInerney were not examined by a handwriting expert; (6) when presented with significant evidence that Defendant McInerney had participated in AB fraud in the 2007 and 2008 elections, Defendant Smith stated that he did not have authority to prosecute those actions. *Id.* at ¶¶ 364-380, 400, 487, 492-500.

James Welch, Brandt Caird, and Sarah Couch, individuals who were involved in the AB forgery, retained attorneys and refused to speak with Defendant Smith absent an immunity agreement. *Id.* at ¶¶ 409-10. In October or November of 2009, Couch and Caird were given promises of non-prosecution in return for their truthful testimony. *Id.* at ¶ 411. In their depositions, Couch and Caird admitted that they allowed John Brown to falsely

write their names as AB agents on several AABs. *Id.* at ¶ 422. Further, Couch stated that she was asked to file the ABs, but did not know that they were forged. *Id.* at ¶¶ 423-25.

On or prior to November 13, 2009, Defendant Smith gave a promise of non-prosecution to Aldritch, an individual who allegedly assisted Defendants McInerney and Dan Brown in getting voters to sign AABs, and who was named as AB agent on 19 of the falsified AABs. *Id.* at ¶¶ 432-33. In a sworn statement, Aldritch denied committing any wrongdoing in connection with the AB forgeries. *Id.* at ¶ 434-35. Several others who were allegedly involved in the forgery professed their innocence, and Defendant Smith took these individuals' statements as true and did not conduct any further investigations into their actions. Defendant O'Malley, who was present in Plaintiff's office when the fraudulent AB envelopes were delivered to Plaintiff, was not asked to give a sworn statement about this account or provide a detailed statement after his general denial of the events. *Id.* at ¶¶ 463-70.

In contrast to the non-confrontational approach of questioning the above-mentioned witnesses, Defendant Smith had Defendant Ogden interview Plaintiff twice on November 19, and December 7, 2009, gave him *Miranda* warnings, and took a sworn, written deposition on both occasions. *Id.* at ¶ 472.

In August of 2010, Defendant Renna allegedly called DeFiglio and "told him that McInerney wanted him to know that if he did not talk to the [police] again it would all be over soon and 'they' would get him an attorney and *'it would all go away.'*" *Id.* at

¶ 503. DeFiglio reported this call to the police, but Defendant Smith did not question Defendant Renna about this apparent witness tampering. *Id.* at ¶¶ 505-06. On November 6, 2009, DeFiglio completed a written sworn statement, which, in essence, contains the following information:

> (a) the AB forgery was committed by the [democratic party operatives] as part of a scheme to falsely vote AB of public housing voters; (b) [John] Brown and McInerney were the primary culprits; (c) [DeFiglio] had assisted McInerney on a few occasions in September 2009; (d) McInerney had possession of all the signed but incomplete AAB that were obtained; and (e) the same scheme of falsely voting AB was perpetrated by DeFiglio, McInerney, Renna and other [democratic party operatives] for more than 25 years.

Id. at ¶ 534; *see also* Dkt. No. 1-1 at 10-12. In this written statement, DeFiglio states that "there is no possible way that the Democratic Commissioner of the [Board of Elections], Ed McDonough, could not have known what was happening." Dkt. No. 1-1 at 12.

From 2009 through 2011, Defendant Smith told officials in the New York State Police that Defendants McInerney and John Brown could not be prosecuted because the evidence against them "was not legally sufficient to corroborate the testimony of DeFiglio or any accomplice or co-conspirator . . . ." *Id.* at ¶ 573.

In an interview on January 27, 2010, Defendant Smith met with Plaintiff to discuss the AB forgery case. The interview started off with Defendant

Smith professing animosity toward Plaintiff's father, the Democratic Party Chair, who had allegedly "turned his back" on Defendant Smith's ambitions to run for County District Attorney. *Id.* at ¶¶ 581-83. When Plaintiff attempted to tell Defendant Smith his recollection of what happened during the AB forgery, Defendant Smith responded that "he was going to 'fuck' [Plaintiff] like his father did him in the past and 'if you don't tell me anything more, the next time we speak will be at a Grand Jury.'" *Id.* at ¶ 585. Plaintiff did not have an attorney present at this meeting. *Id.* at ¶ 586.

After this meeting, Defendant Smith telephoned Defendant McGrath's attorney and offered his client immunity for "anything of value." *Id.* at ¶ 609. Defendant Smith contacted Defendant McGrath's attorney approximately four times between that meeting and March 2, 2010. *Id.* at ¶ 611. On March 12, 2010, Defendant McGrath executed a written cooperation agreement. *Id.* at ¶ 616. In a written deposition on March 22, 2010, Defendant McGrath implicated Plaintiff in the AB forgery scheme. *Id.* at ¶¶ 617-22. Plaintiff contends that this statement was patently false and contradicted by substantial evidence in the record. *Id.* at ¶ 623.

C. Grand Jury Proceeding

In September of 2010, Defendant Smith commenced a grand jury proceeding against Plaintiff and LoPorto. *Id.* at ¶ 708. Despite Defendant Smith stating in his application for DNA testing of the AB envelopes that "the AB forgery was committed in conspiracy by McGrath, [John] Brown, McInerney and other, including [Plaintiff]," no conspiracy charges were brought before the grand jury. *Id.* at

¶¶ 710-11. The evidence presented against Plaintiff at the grand jury proceedings consisted of several witness' testimony and the discovery of Plaintiff's DNA on three AB envelopes. *Id.* at ¶ 714. The press was informed that Plaintiff was the lead subject in the grand jury proceeding and his indictment was imminent. *Id.* at ¶ 709. Plaintiff refused to enter a guilty plea despite several requests from Defendant Smith to do so. *Id.* at ¶ 716. Plaintiff also expressed his intent to testify on his own behalf at the grand jury proceeding. *Id.* at ¶ 724. After this, Defendant McNally contacted Plaintiff and attempted to get him to change his attorney. *Id.* at ¶¶ 726-33. Plaintiff ultimately did not testify at the grand jury. *Id.* at ¶ 739.

On or about December 8, 2010, Defendant McGrath testified before the grand jury. *Id.* at ¶ 748. Essentially, he stated "that he witnessed McDonough write false Excuses on the Dickenson and/or Taylor AAB and on another date overheard McDonough talking with [John] Brown about names he intended to write as AB Agents on about thirty-five (35) AAB . . . ." *Id.* at ¶ 749. Defendant McGrath did not mention that Defendant O'Malley was in the room with him at Plaintiff's office. *Id.* at ¶ 751. Plaintiff contends that this allegedly "false testimony set the foundation for the false testimony of Ogden, [John] Brown and O'Malley." *Id.* at ¶ 757.

Defendant Ogden testified before the grand jury that he reviewed the handwriting on the forged AABs and concluded that they were all falsified by the same person. *Id.* at ¶ 758. Defendant Ogden "later admitted at trial that his purported law

enforcement expert testimony before the Grand Jury was not correct and a mistake." *Id.* at ¶ 768.

Defendant O'Malley initially testified before the grand jury that he wrote excuses on several of the AABs. *Id.* at ¶¶ 769-70. He stated that the person who gave him those excuses was "'probably the candidate' who got that information from 'probably a [democratic committee] operative.'" *Id.* at ¶ 772. In emails between Defendant Smith and Defendant Ogden's and O'Malley's attorney, Defendant Smith expressed his concern that Defendant O'Malley had committed perjury in his testimony. *Id.* at ¶¶ 774-77; *see also* Dkt. No. 1-1 at 23-24. After this, on December 15, 2010, Defendant Smith "sent O'Malley's attorney an e-mail threatening to prosecute him for AB for AB forgery and warning that it made no sense for him to protect his boss." Dkt. No. 1 at ¶ 781. That same day, Defendant O'Malley returned to the grand jury and testified that "on September 14, 2009, his boss McDonough called him into his office and told him to make-up Excuses and write them on those eight (8) AAB, so he did." *Id.* at ¶ 783. At trial, O'Malley admitted that Defendant Smith called him at his home the night before this change in his testimony. *Id.* at ¶ 784.

D. The Indictment and Trials

On January 28, 2011, Plaintiff was charged by indictment with 38 counts of felony forgery in the second degree and 36 counts of felony criminal possession of a forged instrument in the second degree. *Id.* at ¶ 809. In the grand jury proceeding, Defendant Smith presented either testimony or an affidavit from each voter listed on the falsified ABs.

Id. at ¶ 813. Defendant Smith prepared and notarized the affidavits of those individuals who did not testify. *Id.* at ¶ 815. At trial, two of those voters testified that the signature on their purported affidavit was not genuine. *Id.* at ¶ 816; *see also* Dkt. No. 1-1 at 26-30.

On February 24, 2011, Plaintiff unsuccessfully moved to disqualify Defendant Smith as special prosecutor. Dkt. No. 1 at ¶¶ 859-62. On June 13, 2011, Plaintiff filed an unsuccessful motion to dismiss the criminal charges on the basis that Defendant Smith's appointment was unlawful. *Id.* at ¶¶ 869-71. This motion laid out Plaintiff's entire argument that the Defendants had engaged in a scapegoat prosecution against him. *Id.* at ¶ 904. After this motion became public news, "Martiniano came forward and disclosed in a sworn statement to a private investigator that the [police] never interviewed him, [John] Brown and McInerney told him they were going to use the AAB gathered on September 14, 2009 to forge signatures onto AB envelopes and McNally told him that he should not contact the [police] or [Defendant] Smith and disclose the facts he know about the matter because 'it will all be over soon.'" *Id.* at ¶ 908. Defendant Smith took no action against Defendants McInerney or John Brown as a result of this statement. *Id.* at ¶ 913.

On June 10, 2011, Defendant Smith moved to compel the handwriting samples from Plaintiff and LoPorto. *Id.* at ¶ 880. Defendant Robillard was the forensic document examiner hired to perform this comparison. *Id.* at ¶ 884. In his request for a handwriting comparison, Defendant Smith detailed

the testimony against Plaintiff in a letter to Defendant Robillard. *See* Dkt. No. 1-1 at 35-37. Also, Defendant Ogden testified that he "talked to Robillard about the theory of prosecution and evidence" before he issued his report. Dkt. No. 1 at ¶ 1137. Defendant Robillard gave his expert testimony that it was Plaintiff's handwriting on nearly all of the falsified AABs. *Id.* at ¶ 897. He made this initial findings without comparing the handwriting of John Brown, Dan Brown, Defendant McGrath, or other suspects. *Id.* at ¶ 1145. Defendant Robillard was paid approximately $100,000 and was instructed by Defendant Smith to not conduct an ink analysis on several of the falsified AABs. *Id.* at ¶¶ 898, 902, 1152.

In April of 2011, Plaintiff contacted the U.S. attorney's office and requested an FBI investigation into his allegedly unlawful prosecution. *Id.* at ¶ 929. Thereafter, in May of 2011, special agent McDonald was assigned to conduct an investigation into this matter. *Id.* at ¶¶ 930-31. Between May 25 and August 4, 2011, the New York State Police conducted an independent investigation into this matter. *Id.* at ¶ 944. That investigation gathered sufficient evidence against Defendant McInerney for the forgery of approximately 50 of the AABs that appeared to be forged in his handwriting. *Id.* at ¶ 947. Through this investigation, the FBI confirmed that Defendant Smith's "statement to the [police] that McInerney and [John] Brown could not be prosecuted was not true because . . . the voter testimony and forged AB documents were sufficient to corroborate the testimony of any accomplice . . . ." *Id.* at ¶ 942.

On August 8, 2011, Defendant McInerney was arrested on several felony complaints for AB forgeries in 2007 and 2008 elections. *Id.* at ¶ 993. In July of 2011, Defendant Smith had Defendant McNally disqualify himself from prosecuting the actions surrounding the 2007 and 2008 elections. *Id.* at ¶ 1001. Prior to Defendant McInerney entering into a cooperation agreement, he met several times with Defendant Smith outside of the presence of the New York police or the FBI. *Id.* at ¶¶ 1003-04. Defendant McInerney pled guilty to one felony count and was sentenced to a 90 day work order. *Id.* at ¶ 971; Dkt. No. 12-2 at 3.

In two written deposition dated October 20 and November 9, 2011, Defendant Renna made statements confessing his involvement in the forgery scheme and implicating Plaintiff. Dkt. No. 1 at ¶¶ 1022-30. On December 5, 2011, Defendant Renna executed a cooperation agreement, pursuant to which he was required to plead guilty to one felony and sentenced to 200 hours of community service. *Id.* at ¶ 1033. Defendant Renna thereafter testified in a grand jury proceeding against several others involved in the forgery, again implicating Plaintiff. *Id.* at ¶¶ 1034-35.

On December 6, 2011, Defendant John Brown entered into a cooperation agreement, pursuant to which he was required to provide complete and truthful cooperation in return for a guilty plea to one felony count with up to six months incarceration and five years probation. *Id.* at ¶ 1056. Thereafter he gave a written sworn statement and testified before the grand jury as follows:

> (a) he saw McGrath g[i]ve [Plaintiff] an AAB and what seemed to be a false Excuse for an older voter and [Plaintiff] the wrote information on that AAB; (b) he was in [Plaintiff's] office for about forty (40) minutes during which he saw the AAB he brought to the [board of elections] sitting on [Plaintiff's] desk; (c) he saw [Plaintiff] writing on documents but could not say for sure that they were those AAB; and, (d) he saw O'Malley come in and out of the office but did not recall him sitting at a desk or writing on any AAB.

Id. at ¶ 1059. Plaintiff alleges that Defendant Smith met with John Brown before he issued this statement to ensure that it was consistent with the other Defendants' sworn testimony. *Id.* at ¶ 1061.

Plaintiff contends that Defendants McGrath, John Brown, O'Malley, McInerney, Renna, Robillard, Ogden, and Dan Brown each gave false testimony at trial that was consistent with their previous false grand jury testimony and written statements. *Id.* at ¶ 1094. In regards to Defendant Renna's testimony, at the second trial against Plaintiff, the court ordered that his testimony be stricken in its entirety due to its apparent falsity and he was directed to leave the courthouse immediately. *Id.* at ¶ 1125. Despite this, Defendant Smith asked Renna to be sentenced to a work order in accordance with his cooperating agreement. *Id.* at ¶ 1162.

Plaintiff alleges that the County and Defendant McNally's failure to take action to disqualify Defendant Smith from the prosecution contributed to his injuries in this action. *Id.* at ¶ 1181. Plaintiff was indicted on January 28, 2011 and endured two

trials before he was acquitted on December 21, 2012. Dkt. No. 1 at ¶¶ 1199-1200. Plaintiff also suffered emotional and reputational injuries and amassed significant attorneys fees for his criminal defense. *Id.* at ¶¶ 1204-08.

III. DISCUSSION

A. Standard of Review

1. Rule 12(b)(6)

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)); *see also Sutton ex rel. Rose v. Wachovia Secs., LLC*, 208 Fed. Appx. 27, 29-30 (2d Cir. 2006) (noting that, on a motion to dismiss, a court may take judicial notice of documents filed in another court).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," see FED. R. CIV. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the [ ] complaint must be dismissed[,]" *Id.* at 570.

B. General Arguments

While the Defendants are each separately represented and most have moved independently to dismiss Plaintiff's complaint on numerous grounds, several of the arguments are not specific to any individual Defendant and, thus, will be considered before addressing any of the Defendant-specific arguments.

1. Local Rule 7.1

Northern District of New York Local Rule 7.1(a)(1) states that "[n]o party shall file or serve a memorandum of law that exceeds twenty-five (25) pages in length, unless that party obtains leave of the judge hearing the motion prior to filing." Further, Rule 7.1(b)(3) states that "[t]he Court shall not consider any papers required under this Rule that are not timely filed or are otherwise not in compliance with the Rule unless good cause is shown."

In opposition to two of the pending motions, Plaintiff filed memorandum that vastly exceed the 25 page limit. In response to Defendant McInerney's motion, Plaintiff's opposition is 70 pages long, and in response to the Brown Defendants' motion, it is 66 pages with an attached "supplement addendum" that contains an additional 41 pages of factual allegations. *See* Dkt. Nos. 36, 60, 60-2. While these responses grossly exceed the local rule page limit, upon closer examination, the Court need not strike the entire opposition. In the 70 page opposition to Defendant McInerney's motion, the first 39 pages of Plaintiff's memorandum contains a general restatement of the factual allegations contained in his complaint. *See* Dkt. No. 36. In the 66 page opposition to the Brown Defendants' motion, the first 16 pages generally restates the factual allegations in the complaint, and the following eight pages discuss the facts as alleged in the Brown Defendants motion, pointing to allegations in the complaint to refute those facts. *See* Dkt. No. 60. Moreover, the "supplement addendum" to Plaintiff's opposition

consists entirely of additional factual allegations. *See* Dkt. No. 60-2.

The Court does not condone Plaintiff's disregard for the Local Rules page limits for motion practice, especially in light of his failure to seek an exception to the rule. To the extent that they provide additional information not contained in the complaint, the above-mentioned factual sections of Plaintiff's excessive responses to Defendants' motions will be stricken from being considered in ruling on the respective motions. Significantly, Plaintiff has not moved to amend his complaint to allege any additional facts, and opposition memorandum of law are not the proper place to include such facts. When the excessive factual sections are stricken from Plaintiff's oppositions, his memorandum come much closer to the page limits set by the Local Rules. The Court orders that Plaintiff is to strictly abide by the Local Rules' page limits in any further submissions on dispositive motions.

2. Rule 8

With respect to the pleading requirements under Rule 8 of the Federal Rules of Civil Procedure, the Second Circuit has stated as follows:

> Rule 8 provides that a complaint "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement should be plain because the principal function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial. *See, e.g., Geisler v. Petrocelli*,

> 616 F.2d 636, 640 (2d Cir. 1980); 2A Moore's Federal Practice ¶ 8.13, at 8-61 (2d ed. 1987). The statement should be short because "[u]nnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1281, at 365 (1969).
>
> When a complaint does not comply with the requirement that it be short and plain, the court has the power, on its own initiative or in response to a motion by the defendant, to strike any portions that are redundant or immaterial, *see* Fed. R. Civ. P. 12(f), or to dismiss the complaint. Dismissal, however, is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised. *See Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969). When the court chooses to dismiss, it normally grants leave to file an amended pleading that conforms to the requirements of Rule 8. *See generally* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1281, at 366-67; 2A Moore's Federal Practice ¶ 8.13, at 8-81 to 8-82 n.38.

Salahuddin v. Cuomo, 861 F.2d 40, 41-42 (2d Cir. 1998).

Plaintiff's complaint is a 1220 paragraph, 174 page document with 50 additional pages of attached exhibits. *See* Dkt. No. 1. While this is undoubtedly a

voluminous pleading, Plaintiff's allegations span an approximately four year period and implicate ten separate defendants and countless other individuals who played a role in the underlying events giving rise to this action. While there are several repetitious arguments throughout the complaint, it is essentially written in concise separate paragraphs that each provide additional relevant information. Moreover, with a few exceptions, the complaint largely avoids the oftentimes-fatal pitfall of pleading baseless legal conclusions and unsupported hypotheticals. Significantly, Plaintiff's three causes of action are well pled and succinctly stated in the final four pages of his complaint. *See* Dkt. No. 1 at ¶¶ 1209-1220. Further, each Defendant that has responded to the complaint has been able understand the allegations stated therein enough to present colorable arguments and defenses in opposition. Thus, it cannot be said that Defendants are so utterly confused or overwhelmed by Plaintiff's complaint that they are unable to form a reasonable response to it. If Plaintiff had opted to state a less-detailed version of the alleged events giving rise to his claims, Defendants would undoubtedly argue that Plaintiff had failed to present enough factual support to sustain his action under Rule 12(b)(6). The existence of a conspiracy, especially a conspiracy spanning numerous years and encompassing a multitude of actors, necessarily requires significant factual allegations to provide the requisite background to support any related claims. Accordingly, the Court finds that Plaintiff's complaint, although voluminous, complies with the requirements of Rule 8 and Defendants McInerney,

McNally, Ogden, and Rensselaer County's motions to dismiss are denied on this ground.

3. Statute of Limitations

The statute of limitations applicable to Section 1983 claims is the "statute of limitations applicable to personal injuries occurring in the state in which the appropriate federal court sits." *Dory v. Ryan*, 999 F.2d 679, 681 (2d Cir. 1993) (citations omitted). In New York State, the statute of limitations for personal injury claims is three years. N.Y. Civ. Prac. L. § 214(5); *see also Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002) (holding that Section 1983 claims arising in New York are subject to a three-year statute of limitations). Further, accrual begins when the plaintiff "knows or has reason to know of the injury that is the basis for his action." *Pauk v. Bd. of Trustees of City Univ. Of N.Y.*, 654 F.2d 856, 859 (2d Cir. 1981) (citation omitted). Significant in this case is the different accrual points for both malicious prosecution and fabrication of evidence claims: "a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor[,]" *Heck v. Humphrey*, 512 U.S. 477, 489 (1994); whereas "a fair trial claim premised on fabrication of evidence accrues when the plaintiff learns or should have learned that the evidence was fabricated and such conduct causes the claimant some injury [,]" *Mitchell v. Home*, 377 F. Supp. 2d 361, 373 (S.D.N.Y. 2005) (citing *Veal v. Geraci*, 23 F.3d 722,724-25 (2d Cir. 1994)).

Plaintiff asserts a malicious prosecution and a fabrication of evidence claim against each of the Defendants. *See* Dkt. No. 1 at ¶¶ 1209-1220.

Plaintiff was acquitted of all charges brought against him on December 21, 2012. *See id.* at ¶ 1200. Plaintiff's malicious prosecution claim accrued upon this favorable disposition of his criminal case. *See Heck*, 512 U.S. at 489. Accordingly, Plaintiff had three years from this point, until December 21, 2015, to assert a malicious prosecution claim. Thus, this cause of action was timely commenced on December 18, 2015, and, to the extent that any of the Defendants' motions argue otherwise, they are denied on this ground.

Plaintiff's opposition appears to argue that, since the alleged malicious prosecution was based upon the use of fabricated evidence, then both of the claims accrued upon Plaintiff's acquittal from the criminal charges. *See* Dkt. No. 60 at 42-59. However, none of the cases cited in Plaintiff's opposition, nor any precedent discovered by the Court, contradicts the clearly established principle that fabrication of evidence claims accrue when the plaintiff learns, or should have learned, that the evidence was fabricated. *See, e.g., Keller v. Sobolewski*, No. 10-CV-5198, 2012 WL 4863228, *4 (E.D.N.Y. Oct. 12, 2012) (quoting *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 127 (2d Cir. 1997)) ("A § 1983 claim for deprivation of the right to a fair trial arises '[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors'"); *Bailey v. City of New York*, 79 F. Supp. 3d 424, 444 (E.D.N.Y. 2015) (quotation omitted) ("A claim premised on fabrication of evidence 'accrues when the plaintiff learns or should have learned that the evidence was fabricated and such conduct causes the claimant

some injury"). Moreover, the "reference to 'knowledge of the injury' does not suggest that the statute [of limitations] does not begin to run until the claimant has received judicial verification that the defendants' acts were wrongful." *Mitchell*, 377 F. Supp. 2d at 373 (quoting *Veal*, 23 F.3d at 724). Thus, even when a plaintiff's malicious prosecution claims are premised upon a finding that evidence was fabricated, these are two distinct claims that each accrue separately. *Cf.*, *Morse v. Spitzer*, No. 07-CV-4793, 2012 WL 3202963, *6 (E.D.N.Y. 2012) (emphasis added) ("In such cases, the question of whether the defendant fabricated evidence becomes synonymous with the question of whether genuine probable cause existed, and accordingly a plaintiff's malicious prosecution and fair trial claims would rise or fall together. Even in such cases, however, *these remain distinct constitutional claims*").

Plaintiff also argues that his fabrication of evidence claims are premised upon his Sixth Amendment right to a fair trial, and not solely under the due processes clauses of the Fifth and Fourteenth Amendments. Plaintiff contends that, while the due process claim for fabrication of evidence may accrue when that evidence is first produced, the Sixth Amendment claim accrues upon the termination of his criminal proceeding. *See* Dkt. No. 60 at 48-51 (citing *Bailey v. City of New York*, 79 F. Supp. 3d 424, 455 (E.D.N.Y. 2015); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999)). Plaintiff bases this argument on the Supreme Court's holding in *Heck*, which delayed the accrual of a prison inmate's § 1983 claim until after his outstanding conviction was overturned, because his § 1983 claim

would have otherwise established the invalidity of his conviction. 512 U.S. at 484. In *Covington*, the Second Circuit extended the holding in *Heck* to "claims that, if successful, would necessarily imply the invalidity of a potential conviction on a pending criminal proceeding." *Covington*, 171 F.3d at 124. The Second Circuit adopted the position that "there is no difference between a conviction which is *outstanding* at the time the civil rights action is instituted and a *potential* conviction on a pending charge that may be entered at some point thereafter." *Id.* (quoting *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir. 1996)). Thereafter, the Supreme Court admonished the expansion of the *Heck* accrual rule to cases such as this in which a final conviction had not been obtained, holding that such expansion was not warranted:

> What petitioner seeks, in other words, is the adoption of a principle that goes well beyond *Heck*: that an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious. In an action for false arrest it would require the plaintiff (and if he brings suit promptly, the court) to speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict, *see Heck*, 512 U.S., at 487, n.7, 114 S. Ct. 2364—all this at a time when it can hardly be known what evidence the prosecution has in its possession. And what if the plaintiff (or the court) guesses wrong,

> and the anticipated future conviction never occurs, because of acquittal or dismissal? Does that event (instead of the *Heck*-required setting aside of the extant conviction) trigger accrual of the cause of action? Or what if prosecution never occurs—what will the trigger be then?
>
> We are not disposed to embrace this bizarre extension of *Heck*. If a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. *See id.*, at 487–488, n.8, 114 S. Ct. 2364 (noting that "abstention may be an appropriate response to the parallel state-court proceedings"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730, 116 S. Ct. 1712, 135 L.Ed. 2d 1 (1996). If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit. *Edwards v. Balisok*, 520 U.S. 641, 649, 117 S. Ct. 1584, 137 L.Ed. 2d 906 (1997); *Heck*, 512 U.S. at 487, 114 S. Ct. 2364.

Wallace v. Kato, 549 U.S. 384, 393-94 (2007). Moreover, alleging a conspiracy to submit fabricated evidence, rather than asserting the claims against the individual defendants, does not change the

accrual date of such claims because with "claims alleging civil conspiracies, including conspiracies to violate an individual's civil rights, 'the cause of action accrues and the statute of limitations begins to run from the time of commission of the overt act alleged to have caused damages.'" *Harrison v. New York*, 95 F. Supp. 3d 293, 327 (E.D.N.Y. 2015) (citations omitted). Accordingly, Plaintiff's fair trial claim based upon the fabrication of evidence accrued when he knew or should have known that such evidence was being used against him and not upon his acquittal in his criminal case.

The Court notes that, while only the Brown Defendants, Defendant McNally, and the County raise the defense of statute of limitations in their respective motions to dismiss, the Court will consider the timeliness of the claims brought against the remaining Defendants as well. *See Clement v. United Homes, LLC*, 914 F. Supp. 2d 362, 375 (E.D.N.Y. 2012) (citing *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980)) (quotation omitted) ("Where one defendant has successfully raised a statute of limitations defense with respect to a particular claim, a court may also dismiss the claim *sua sponte* as to similarly situated defendants"). Significantly, Plaintiff does not contend that any of the Defendants fabricated evidence within the three-year statute of limitations, rather he relies solely on the argument that this claim did not accrue until his acquittal. As Plaintiff commenced the instant action on December 18, 2015, a fabrication of evidence claim is timely if Plaintiff knew or should have known that the evidence was fabricated on or after December 18, 2012. Plaintiff's

complaint clearly alleges that all of the fabricated evidence was either presented at grand jury proceedings or during his two trials, all of which occurred prior to December 18, 2012. Accordingly, Count I of Plaintiff's complaint alleging the fabrication of evidence is barred by the statute of limitations and, thus, is dismissed as against all Defendants. The Court will not address the merits of the individual Defendants' arguments that Plaintiff failed to state a claim for his fabrication of evidence cause of action.

4. Legal Standard

1. Malicious Prosecution

"The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person – i.e., the right to be free of unreasonable or unwanted restraints on personal liberty." *Singer v. Fulton Cnty. Sher*iff, 63 F.3d 110, 116 (2d Cir. 1995). To assert a Fourth Amendment claim for malicious prosecution under Section 1983, a plaintiff must show a deprivation of his or her liberty consistent with the concept of "seizure," so as to ensure that the harm suffered is of "constitutional proportions." *Id.* The elements of malicious prosecution under Section 1983 effectively mirror the elements of the same claim under New York law. *See Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (citations omitted). Accordingly, to state a cause of action for malicious prosecution in New York, the plaintiff must prove "'(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as

a motivation for defendant's actions.'" *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003) (quotation omitted). To sustain the malicious prosecution claim under Section 1983, "the state law elements must be met, and there must also be a showing of a 'sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights.'" *Rutigliano v. City of New York*, 326 Fed. Appx. 5, 8-9 (2d. Cir. 2009) (quotation omitted).

Plaintiff's complaint clearly pleads the first two elements of a malicious prosecution claim because he was indicted and charged with 74 felony counts, arrested on January 28, 2011, and acquitted of all charges on December 21, 2012. *See* Dkt. No. 1 at ¶¶ 1199-1200; *see also Phillips v. DeAngelis*, 571 F. Supp. 2d 347, 353 (N.D.N.Y. 2008) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)) ("The requirement that a plaintiff show an initiation or continuation of a criminal proceeding by the defendant may be satisfied by a showing that the defendants filed formal charges and caused the plaintiff to be arraigned").

"'[T]he existence of probable cause is a complete defense to a claim of malicious prosecution in New York.'" *Manganiello v. City of New York*, 612 F.3d 149, 161-62 (2d Cir. 2010) (quoting *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003)). "Probable cause may . . . exist where the officer has relied on mistaken information, so long as it was reasonable for him to rely on it. However, 'the failure to make a further inquiry when a reasonable person would have done so may be evidence of lack of probable cause.'" *Id.* at 161 (quoting *Colon v. City of New*

York, 60 N.Y.2d 78, 82 (1983)) (internal citation omitted). Moreover, "indictment by a grand jury creates a presumption of probable cause that may *only* be rebutted by evidence that the indictment was procured by 'fraud, perjury, the suppression of evidence or other [official] conduct undertaken in bad faith.'" *Savino*, 331 F.3d at 72 (quoting *Colon*, 60 N.Y.2d at 83). Lastly, the lack of probable cause alone "generally raises an inference of malice." *Ricciuti*, 124 F.3d at 131.

Here, Plaintiff was indicted by a grand jury on January 28, 2011. Dkt. No. 1 at ¶ 809. Plaintiff's indictment was based, in part, upon affidavits from voters who claimed that their ABs had been falsified, which were prepared and notarized by Defendant Smith. *Id.* at ¶¶ 813, 815. At trial, two of the voters whose affidavits were presented at the grand jury proceeding testified that the signature on their purported affidavits were not genuine. *Id.* at ¶ 816; *see also* Dkt. No. 1-1 at 26-30. Plaintiff's indictment was also partially based upon the testimony of Defendant Ogden, who told the grand jury that he reviewed the handwriting on the forged AABs and concluded that they were all falsified by the same person. Dkt. No. 1 at ¶ 758. Thereafter, Defendant Ogden "admitted at trial that his purported law enforcement expert testimony before the Grand Jury was not correct and a mistake." *Id.* at ¶ 768. Defendant O'Malley likewise testified before the grand jury, initially stating that he wrote excuses on several of the AABs, which he testified probably came from the AB candidate who got the information from a democratic committee operative. *Id.* at ¶ 772. Thereafter, Defendant O'Malley returned to the

grand jury to testify that "on September 14, 2009, [Plaintiff] called him into his office and told him to make-up Excuses and write them on those eight (8) AAB, so he did." *Id.* at ¶ 783. Plaintiff contends Defendant Smith called Defendant O'Malley at his house and encouraged him to change his testimony in this manner. *Id.* at ¶ 784. Based upon these allegations of forgery, untruthful testimony, and suppression of evidence, Plaintiff has sufficiently rebutted the presumption that a grand jury indictment creates probable cause for his indictment. *See Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir. 2003) (quoting *Colon*, 60 N.Y.2d at 82-83) ("The presumption is rebuttable, and may be overcome by evidence establishing that the police witnesses 'have not made a complete and full statement of facts . . . that they have misrepresented or falsified evidence . . . or otherwise acted in bad faith.'").

On the element requiring the prosecution to be motivated by actual malice, the alleged lack of probable cause supporting the grand jury decision, coupled with the alleged purpose of Plaintiff's indictment to be a "scapegoat prosecution" to shield other political candidates from public and legal scrutiny, sufficiently pleads that the prosecution was undertaken with actual malice. *See Ricciuti*, 124 F.3d at 131 (citation omitted) ("[L]ack of probable cause generally raises an inference of malice . . . .").

To state a § 1983 malicious prosecution claim, a plaintiff must also allege "a sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights." *Rohman v.*

N.Y.C. Transit Auth., 215 F.3d 208, 215 (2d Cir. 2000) (citation omitted).

> The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person–i.e., the right to be free of unreasonable or unwarranted restrains on personal liberty. A plaintiff asserting a Fourth Amendment malicious prosecution claim under § 1983 must therefore show some deprivation of liberty consistent with the concept of 'seizure.'

Id. (quoting *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). Thus, a plaintiff pursuing a malicious prosecution claim "under § 1983 must show that the seizure resulted from the initiation or pendency of judicial proceedings." *Id.*

Here, Plaintiff was required to endure two separate trials and was not acquitted of the charges against him until nearly two years until after he was indicted. *See* Dkt. No. 1 at ¶¶ 1199-1200. These allegations clearly state that Plaintiff suffered a restraint on his liberty that extended beyond the arraignment itself. *See Rohman*, 215 F.3d at 216 (holding that a plaintiff who was required "to return to court on at least five occasions before the charges against him were ultimately dropped[,]" coupled with the fact that a New York criminal defendant released on his own recognizance "must 'render himself at all times amenable to the orders and processes of the court,'" was sufficient to allege post-arraignment liberty restraint). Accordingly, the Court finds that Plaintiff's complaint has sufficiently alleged facts to support a § 1983 malicious prosecution claim. However, the Court will discuss below whether each

Defendant is individually liable for this malicious prosecution and whether any of the defendants have a valid defense to the claim.

2. § 1983 Conspiracy

A plaintiff may maintain a Section 1983 action against a private party defendant who is engaged in a conspiracy with one or more state actors. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002). To survive a motion to dismiss, the complaint must allege "(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Id.* at 324-25 (citing *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999)). Thus, a plaintiff must first allege sufficient facts to support an underlying constitutional violation in order to state a valid § 1983 conspiracy claim. *See Curley v. Vill. of Suffern*, 268 F.3d 65, 72 (2d Cir. 2001). Moreover, "[w]hile 'conclusory allegations' of a § 1983 conspiracy are insufficient, we have recognized that such 'conspiracies are by their very nature secretive operations,' and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn*, 200 F.3d at 72 (quoting *Dwares v. City of New York*, 985 F.2d 94, 99-100 (2d Cir. 1993); *Rounseville v. Zahl*, 13 F.3d 625, 632 (2d Cir. 1994)). In the instant case, the alleged unconstitutional injury implicated by the conspiracy is based on a claim of malicious prosecution. As discussed above, Plaintiff has adequately pled facts to support a malicious prosecution claim. In the following sections, the Court will discuss whether Plaintiff's

complaint sufficiently alleges actions taken by each of the Defendants to support a conspiracy claim.

5. Absolute Immunity

Trial or grand jury witness testimony, even if perjured, cannot serve as the basis for a § 1983 claim. *See Coggins v. Cnty. of Nassau*, 988 F. Supp. 2d 231, 244 (E.D.N.Y. 2013) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983)); *see also Rehberg v. Paulk*, 132 S. Ct. 1497, 1506-07 (2012) (holding that asserting a § 1983 claim as a conspiracy, rather than as an individual action, does not remove the absolute immunity protection). Moreover, preparatory communications between a witness and a prosecutor regarding the contents of any future testimony is entitled to absolute immunity. *See Rehberg*, 132 S. Ct. at 1506-07 ("In the vast majority of cases involving a claim against a grand jury witness, the witness and the prosecutor conducting the investigation engage in preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony").

a. Coggins Exception

Simply because a defendant is a witness in a grand jury or trial proceeding, however, does not grant that individual absolute immunity for all actions arising out of the substance testified about. *See Coggins v. Buonora*, 776 F.3d 108, 112-13 (2d Cir. 2015). Rather, the absolute immunity extends only to that information that was the substance of the witness' testimony. In *Coggins*, the Second Circuit held that a plaintiff may state a valid malicious prosecution claim against a grand jury witness, even with absolute immunity for the testimony given in such

proceeding, if the plaintiff alleges actions taken in excess of that witness' testimony that would amount to an independent § 1983 claim. *Id.* at 113.

> When a police officer claims absolute immunity for his grand jury testimony under *Rehberg*, the court should determine whether the plaintiff can make out the elements of his § 1983 claim without resorting to the grand jury testimony. If the claim exists independently of the grand jury testimony, it is not "based on" that testimony, as that term is used in *Rehberg*. *Id.* at 1506. Conversely, if the claim requires the grand jury testimony, the defendant enjoys absolute immunity under *Rehberg*.

Id. A defendant likewise does not receive absolute immunity for information related to their testimony that he or she discloses through another source. *Id.* ("The fact that [a witness'] grand jury testimony paralleled information he gave in other contexts does not mean that [the plaintiff's] malicious prosecution claim was 'based on' [the witness'] grand jury testimony. Rather it was based on [the witness'] conduct that laid the groundwork for [the plaintiff's] indictment").

The Second Circuit's holding in *Coggins* requires a court to determine whether a statement or action made in addition to a witness' testimony is preparatory activity in anticipation for that testimony, which would receive aboslute immunity. *See Coggins*, 776 F.3d at 113 n.7. In the post-*Coggins* line of cases in this circuit, there are three emerging factors that are relevant to whether a given activity is considered preparatory. First is the

timing of the action as compared to the plaintiff's indictment and the defendant's testimony, *see O'Neal v. City of New York*, 14-CV-7649, 2016 WL 4035522, *6 (S.D.N.Y. July 22, 2016), second is the form of the action, whether it is a written documentation or an oral statement to the prosecutor or investigator, *see id.* at *7, and the third is whether the defendant's statement was an isolated remark that is "merely prefatory to a defendant['s] . . . own testimony" as compared to one designed to elicit additional false testimony from other witnesses, *see Fappiano v. City of New York*, No. 01 Civ. 2476, 2015 WL 94190, *20 (E.D.N.Y. Jan. 7 2015).

Fabricated documentary evidence, such as a police report or investigative affidavit, given to a district attorney that lays the groundwork for a plaintiff's indictment is clearly not preparatory activity and does not receive absolute immunity. *See Rucks v. City of New York*, 96 F. Supp. 3d 138, 150 (S.D.N.Y.) (holding that an investigating officer's actions of making false statements to each other, in written police reports, and to the ADA were not entitled to absolute immunity). In *Coggins*, the Second Circuit concluded that an officer who falsified official documents related to the plaintiff's arrest, failed to complete an incident report, and conspired to create "an altered version of what transpired . . . and made a conscious decision to omit certain information and include false information in the Police Report and accompanying arrest paperwork" was not entitled to absolute immunity. 776 F.3d at 110-11. The officer's actions and falsified reports were the main basis for the plaintiff's grand jury indictment. *Id.* By contrast, in *O'Neal*, the defendant witness made oral

false statements to a prosecutor two weeks before he testified at trial, and nearly ten months after the plaintiff was indicted. 2016 WL 4035522, at *5. The Southern District concluded that these statements were merely preparatory activity since they did not play an active role in the plaintiff's indictment, they consisted solely of oral statements to the prosecutor and did not include any fabricated documentary evidence, and the statement to the prosecutor simply mirrored the defendant's testimony at trial. *Id.* at *7-8.

In *Fappiano v. City of New York*, the Eastern District drew the distinction between an officer merely presenting false testimony at trial, and an officer actively engaging in pre-trial acts to solicit false testimony from other witnesses in order to "fill the gaps" in his story to aid in the plaintiff's conviction. 2015 WL 94190, at *20 (citing *Mitchell v. City of Boston*, 130 F. Supp. 2d 201, 212 (D. Mass. 2001)). In *Mitchell*, "the court found that the officer whose total involvement was allegedly testifying falsely was immune under *Briscoe*, while the other officer, who was 'the mastermind of the plot to fabricate evidence,' was not immune because he did more than falsely testify–he fabricated a case against the defendant-turned-plaintiff by taking 'it upon himself to fill the gaps in his story by soliciting false testimony from [his partner].'" *Fappiano*, 2015 WL 94190, at *20 (quoting *Mitchell*, 130 F. Supp. 2d at 213). The *Coggins* decision requires the district court to determine whether a plaintiff's complaint contains sufficient allegations against the witness-defendants, separate from his trial or grand jury

testimony, that amount to an independent § 1983 claim. 776 F.3d at 113.

b. Complaining Witness

An individual who plays a role in initiating a criminal defendant's prosecution is known as a complaining witness. *See White v. Frank*, 855 F.2d 956, 959 (2d Cir. 1988); *see also Rehberg v. Paulk*, 132 S. Ct. 1497, 1507 (2012) (noting that a complaining witness need not testify before a grand jury or in trial). Such a complaining witness, even if he or she later testifies, does not receive absolute immunity for the actions taken to initiate the prosecution. *White*, 855 F.2d at 959 (citing *Malley v. Briggs*, 475 U.S. 335, 340 (1986)). However, merely presenting key testimony at a grand jury proceeding that leads to an indictment does not transform that witness into a complaining witness. *See Rehberg*, 132 S. Ct. at 1507-08. Rather, a complaining witness must take such control over the initiation of the prosecution as to effectively overtake the decision of whether to press charges away from the prosecutor. *Id.*

C. Defendant McInerney[2]

1. Malicious Prosecution

a. Individual Liability

Initially, Plaintiff has failed to allege that Defendant McInerney was directly responsible for his malicious prosecution. Plaintiff's opposition

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[2] The Court will not consider the self-serving affidavits that Defendant McInerney or Plaintiff submitted with this motion. *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

argues that Defendant McInerney was a complaining witness and, as such, is subject to an individual malicious prosecution claim. However, Plaintiff has not alleged that Defendant McInerney became involved in the investigation or gave any statements about the circumstances underlying his prosecution until after Plaintiff had already been indicted. The only pre-indictment actions done by Defendant McInerney was his grand jury testimony. As such, to the extent that Plaintiff's complaint contains a direct cause of action for malicious prosecution against Defendant McInerney, any such claim is dismissed.

b. Conspiracy

Defendant McInerney argues that his motion to dismiss should be granted for the following three reasons: (1) that he enjoys absolute immunity for his trial and grand jury testimony, (2) that the routine communications between himself and the prosecutor, Defendant Smith, cannot serve as the basis for a § 1983 conspiracy claim, and (3) Defendant McInerney's cooperation in investigations and during plea negotiations cannot amount to a malicious prosecution conspiracy. *See* Dkt. No. 12-2 at 7-12.

Plaintiff alleges that Defendant McInerney conspired with Defendant Smith to produce false testimony at trial and before the grand jury. The acts alleged in furtherance of this conspiracy are that (1) Defendant McInerney testified falsely at the direction of Defendant Smith and withheld pertinent information from his testimony that would have exonerated Plaintiff, (2) Defendant McInerney prepared a sworn, written statement on September 16, 2011 that falsely incriminated Plaintiff, (3) Defendant McInerney engaged in several discussions

with Defendant McNally and Defendant Smith outside of police presence, and (4) Defendant Smith offered Defendant McInerney immunity for his testimony and, after his indictment was imminent, offered a generous plea deal that avoided significant incarceration.

Defendant McInerney's grand jury and trial testimony receive absolute immunity and cannot serve as the basis for a § 1983 claim, even if that testimony was fabricated or perjurious. *See generally Rehberg v. Paulk*, 132 S. Ct. 1497 (2012). Further, allegations of a witness' communication with the prosecutor to prepare for such testimony are likewise insufficient to state a conspiracy claim. *See Scotto v. Almenas*, 143 F.3d 105, 115 (2d Cir. 1998) (quoting *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 256 (2d Cir. 1984)) ("[T]here [is] 'nothing suspicious or improper in such meetings [between a witness and a prosecutor], which are routine and necessary in the preparation of evidence,' and that the 'mere allegation of their occurrence is [not] sufficient to create a material issue of fact as to whether something improper took place during them. . . ."); *see also Rehberg*, 132 S. Ct. at 1506-07.

Defendant McInerney's act of issuing a written statement, however, does not automatically receive absolute immunity. *See Coggins*, 776 F.3d at 113. His written statement says, in part, that "on September 15, 2009 LoPorto called several times and asked if the AB 'were done yet' and after he forged them he gave them to LoPorto at City Hall in a manila envelope." Dkt. No. 1 at ¶ 156. Further, Defendant McInerney state that he was "certain that those AB never left the [Board of Elections], and that

they were forged by [Plaintiff] while in his office." *Id.* at ¶ 1018. This written statement was prepared at Defendant Smith's direction and falsely incriminated Plaintiff. *Id.* at ¶¶ 1008-13. The Court concludes that, based upon the allegations in Plaintiff's complaint, Defendant McInerney's written statement was not merely preparatory activity for his trial testimony and, thus, is not entitled to absolute immunity.

In *Coggins* and *Rucks*, as opposed to here, the allegedly false written statement was issued prior to the plaintiff's indictment by the grand jury. *See Coggins*, 776 F.3d at 114; *Rucks*, 96 F. Supp. 3d at 148. By contrast, Defendant McInerney did not issue his written statement until after Plaintiff was indicted by the grand jury on January 28, 2011. *See* Dkt. No. 1 at ¶ 809. The Court finds that the holding in *Coggins* is not limited to written statements made prior to a plaintiff's indictment, as a defendant may be liable for a malicious prosecution claim for the continuation of a proceeding after it is clear that no probable cause exists and not just for the initiation of such action in the absence of probable cause. *See, e.g., Weiner v. McKeefery*, 90 F. Supp. 3d 17, 35 (E.D.N.Y. 2015) (quotation omitted) ("[C]ontinued prosecution after facts sufficient to exonerate the accused have been provided may give rise to an action for malicious prosecution under New York law"). Here, Defendant McInerney issued his written statement prior to Plaintiff's first trial in February of 2012 and well before Plaintiff's second trial. Moreover, Plaintiff clearly alleged that Defendant McInerney's written statement served as a basis upon which the other witnesses fabricated

their testimony to ensure that it was consistent with the prosecution's otherwise unsupported theory against Plaintiff. Dkt. No. 1 at ¶ 1009. Accordingly, the fact that Defendant McInerney's written statement was made after Plaintiff had already been indicted does not preclude the finding that the written statement nonetheless contributed to Plaintiff's continued malicious prosecution. Further, that Defendant McInerney issued his statement as a sworn, written document, rather than simply through oral communications with Defendant Smith, warrants a finding that this statement was more than merely a preparatory action for his testimony and instead was created to influence the testimony of the other witnesses. *See Mitchell*, 130 F. Supp. 2d at 212 (holding that a written statement that forms the basis for future false testimony is not protected by absolute immunity). Plaintiff has clearly alleged that this written statement was made in connection with and at the direction of Defendant Smith, thereby alleging an agreement between Defendant McInerney, a private actor, and Defendant Smith, a state actor. Dkt. No. 1 at ¶ 1008. The Court finds that, based upon Plaintiff's allegations, Defendant McInerney's written statement was not created solely for the preparation of his trial testimony. Thus, the written statement, which is not protected by absolute immunity, could have been a foundation upon which other witnesses may have shaped their allegedly false testimony that was presented at trial, thereby alleging an independent ground apart from Defendant McInerney's trial testimony upon which to base the malicious prosecution claim.

Plaintiff's additional allegations, although circumstantial, support his claim that Defendants Smith, who is a state actor, and McInerney were acting in concert. *See In re Dana Corp.*, 574 F.3d 129, 153 (2d Cir. 2009) (quotation omitted) ("[I]t is well established that '[b]oth the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and . . . intent may be established through circumstantial evidence'"). Defendant Smith's initial promise of non-prosecution, coupled with the allegedly lenient treatment of Defendant McInerney in affording him a favorable plea deal for the same conduct that Plaintiff was accused of, supports Plaintiff's contention that the Defendants were attempting to focus the prosecution on him so that the other Defendants involved would not be convicted of the forgeries in which they were directly implicated. Defendant Smith offered Defendant McInerney a plea deal for one felony charge and a 90 day work order in satisfaction of all charges that could have been brought against him for the three years of easily provable forgeries involved in the 2007, 2008, and 2009 elections, each charge of which would have carried consecutive sentences of two to seven years. Dkt. No. 1 at ¶ 971; Dkt. No. 12-2 at 3. During the initial investigation into Plaintiff, Defendant Smith repeatedly declared that he did not have enough evidence to indict McInerney for the forgery scheme, *see* Dkt. No. 1 at ¶ 573, despite ultimately changing his position and indicting Defendant McInerney only after independent New York State Police and FBI investigations intervened, *id.* at ¶¶ 929, 930-31, 942. Further, as soon as it became clear that Defendant McInerney was going to face charges for forgeries in

the 2007 and 2008 elections, Defendant Smith immediately moved to expand his jurisdiction to prosecute those cases, *id.* at ¶¶ 993, 1001, despite previous repeated assertions that he did not have the authority to prosecute the earlier elections' forgeries when evidence clearly implicated Defendant McInerney, *see id.* at ¶¶ 364-380, 400, 487, 492-500. Moreover, Plaintiff's allegations of several off-the-record meetings between Defendant Smith and McInerney hint at the possibility of the two acting in concert.[3] *See id.* at ¶¶ 1003-04. Accordingly, Plaintiff has stated a valid claim that Defendant McInerney conspired to maliciously prosecute Plaintiff in violation of § 1983. Defendant McInerney's motion is denied on this ground.

3. Municipal Liability

Defendant McInerney argues that Plaintiff has failed to allege any facts sufficient to hold him personally liable for the allegations contained in Count III. *See* Dkt. No. 12-2 at 19. As Count III is directed solely at the County of Rensselaer and does not implicate any individual Defendant, Defendant McInerney's motion on this ground is denied as moot. To the extent that any of the other individual Defendants raise an argument to dismiss Count III, those arguments are likewise denied as moot since Count III does not allege any action against the individual Defendants.

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[3] The Court notes that, if discovery were to establish that these meetings constituted "preparatory activity" for Defendant McInerney's trial testimony, then Defendant McInerney would be entitled to absolute immunity for that conduct. *See Coggins*, 776 F.3d at 113 & n.7 (citing *Rehberg*, 132 S. Ct. at 1506-07).

C. John and Daniel Brown[4]

Plaintiff's opposition to the Brown Defendants' motion states that "the allegations of conspiracy [in the complaint] are supported by numerous particularized facts which, taken as true, 'suggest than an agreement was made' whether tacit or expressed . . . ." Dkt. No. 60 at 60-61. However, Plaintiff does not describe what particular assertions he is referring to. A liberal reading of Plaintiff's complaint finds the following specific accusations against the Brown Defendants. Prior to October 1, 2009, Defendant Smith allegedly told and John Brown that he would not be prosecuted for the AB forgery. *Id.* at ¶ 266. On December 6, 2011, Defendant John Brown entered into a cooperation agreement, pursuant to which he was required to provide complete and truthful cooperation in return for a guilty plea to one felony count with up to six months incarceration and five years probation. *Id.* at ¶ 1056. Thereafter on December 6, 2011 he gave a sworn, written deposition wherein he fabricated incidents that occurred in Plaintiff's office and implicated Plaintiff in the forgery scheme. *Id.* at ¶ 1057-58. Specifically, John Brown stated that

> (a) he saw McGrath g[i]ve [Plaintiff] an AAB and what seemed to be a false Excuse for an older voter and [Plaintiff] then wrote information on that AAB; (b) he was in [Plaintiff's] office for about forty (40) minutes

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[4] The Court will not consider the self-serving affidavits or additional evidence submitted with the Brown Defendants' motion to dismiss. *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

> during which he saw the AAB he brought to the [Board of Elections] sitting on [Plaintiff's] desk; (c) he saw [Plaintiff] writing on documents but could not say for sure that they were those AAB; and, (d) he saw O'Malley come in and out of the office but did not recall him sitting at a desk or writing on any AAB.

Id. at ¶ 1059. Plaintiff alleges that Defendant Smith met with John Brown before he issued this statement to ensure that it was consistent with the other Defendants' sworn testimony. *Id.* at ¶ 1061. Further, Plaintiff contends that John Brown tampered with another witness, DeFiglio, by offering him a job in Vermont in an attempt to get DeFiglio not to talk with the police. *See id.* at ¶¶ 504, 509.

This written statement is similar to Defendant McInerney's, in that it was issued after Plaintiff was indicted, but before any testimony at either of his trial. Plaintiff contends that this written statement served the basis for other Defendants' allegedly false testimony in an attempt to continue the malicious prosecution of Plaintiff. *Id.* at ¶ 1061. While this written statement does not receive absolute immunity and is arguably an overt act that contributed to Plaintiff's malicious prosecution, Plaintiff has failed to state sufficient allegations that John Brown and Defendant Smith had an agreement to engage in such unconstitutional actions. Plaintiff's complaint consists of mainly conclusory allegations that John Brown conspired with Defendant Smith to scapegoate prosecute Plaintiff for the AB forgeries. In contrast to the allegations against Defendant McInerney that state specific interactions and communications between Defendant

Smith and Defendant McInerney to state a valid conspiracy claim, Plaintiff's allegations against John Brown are mere conclusory statements and any circumstantial evidence linking John Brown to Defendant Smith is fall more tenuous than that against Defendant McInerney. *See Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993), *overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) ("[A plaintiff] should make an effort to provide some 'details of time and place of the alleged effect of the conspiracy'").

The extent of Plaintiff's non-conclusory allegations against John Brown are that, prior to 2011, Defendant Smith told officials from the New York State Police that John Brown could not be prosecuted because the evidence against him was not legally sufficient to corroborate the testimony of DeFiglio. *Id.* at ¶ 573. On December 6, 2011, after his indictment was imminent, John Brown entered into a cooperation agreement and pled guilty to one felony count and was sentenced to six months incarceration and five years probation. *Id.* at ¶ 1056. This sentence was the most that any of the co-conspirators in the forgery scheme received, far less favorable that the 90 day work order given to Defendant McInerney or the 200 hours of community service given to Defendant Renna. *See* Dkt. No. 1 at ¶¶ 971, 1033; Dkt. No. 40-3 at 16; *see also Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) (holding that the adversarial position of alleged co-conspirators belies bald conclusory allegations of conspiracy). Plaintiff's response to the Brown Defendants' motion argues that "numerous

detailed facts and circumstances" contained in the complaint indicate John Brown's alleged agreement to conspire with Defendant Smith, yet he does not specifically cite to any of these so-called "detailed facts." *See* Dkt. No. 60 at 60. Accordingly, the Court finds that Plaintiff's complaint fails to sufficiently allege, beyond mere conclusory allegations, that John Brown actively or implicitly agreed to conspire with Defendant Smith in an effort to continue the malicious prosecution against Plaintiff. As such, Plaintiff's malicious prosecution conspiracy claims against John Brown are dismissed.

The only allegations implicating Daniel Brown is that he falsely testified before the grand jury. *Id.* at ¶ 1133. In their motion to dismiss, the Brown Defendants argue that Daniel Brown did not testify before the grand jury, and only testified in Plaintiff's first criminal trial. *See* Dkt. No. 40-3 at 9. Irrespective of when Daniel Brown testified, his testimony from either the grand jury or at trial are equally entitled to absolute immunity and cannot serve as the basis for a § 1983 conspiracy claim. *See Rehberg*, 132 S. Ct. at 1506-07. Plaintiff argues that the Brown Defendants do not receive absolute immunity for their testimony because they are "complaining witnesses." *See* Dkt. No. 60 at 63-64. This argument is unavailing given that neither of the Brown Defendants were involved in the investigation until after Plaintiff had been indicted. As such, their actions could not have directed Defendant Smith to start the prosecution against Plaintiff and, also, could not have formed the basis of Plaintiff's indictment. Accordingly, all malicious prosecution and conspiracy claims against Daniel Brown are

dismissed given his absolute immunity for trial and grand jury testimony. The Brown Defendants' motion to dismiss is granted in its entirety and both John and Daniel Brown are terminated from this action.

D. Defendant O'Malley

Plaintiff's complaint repeatedly states, in conclusory fashion, that Defendant O'Malley actively conspired with Defendant Smith and the other Defendants to scapegoat prosecute Plaintiff for the AB forgeries. Fatal to Plaintiff's claims, however, is the absence of any allegation of an overt act taken by Defendant O'Malley, apart from trial and grand jury testimony, that was in furtherance of any such alleged conspiracy. In fact, Plaintiff specifically alleges that "O'Malley's role . . . was to not talk prior to Grand Jury, but give fabricated false testimony as needed at Grand Jury and trial to initiate and continue the scapegoat prosecution." Dkt. No. 1 at ¶ 452. As discussed above, Defendant O'Malley's testimony, even if fabricated or perjurious, receives absolute immunity and cannot serve as the basis for a § 1983 claim. *See Rehberg*, 132 S. Ct. at 1506-07.

Plaintiff's opposition argues that Defendant O'Malley took actions in concert with Defendant Smith, at some unmentioned time and unknown location, to work together to fabricate O'Malley's grand jury testimony to be consistent with the other Defendants'. *See* Dkt. No. 69. Even if Plaintiff alleged in a less conclusory and more detailed fashion the manner in which Defendants Smith and O'Malley worked together to plan his grand jury testimony, such preparatory activity is entitled to absolute immunity. *See Coggins v. Buonora*,

776 F.3d 108, 113 n.7 (2d Cir. 2015). Plaintiff does not allege that Defendant O'Malley took some other action outside of his testimony, such as contributing to a false police report, issuing a false written statement, or actively participating in the investigation, that acted to further the alleged conspiracy. Accordingly, Plaintiff has not stated any allegations separate and distinct from Defendant O'Malley's trial or grand jury testimony that would independently support a § 1983 claim. *See id.* at 113.

Plaintiff also argues that "[n]o decision has extended absolute immunity to prosecutors, police officers or private citizens for the act of manufacturing false evidence outside the judicial process to later present before a grand jury or trial." Dkt. No. 69 at 13. While Plaintiff's opposition does not separate whether he is discussing his fabrication of evidence claims or his malicious prosecution claims, it appears that the majority of his discussion involves the fabrication of evidence claim. As noted above, all such claims are dismissed on statute of limitations grounds. Thus, Defendant O'Malley's motion to dismiss is granted in its entirety and he is terminated from this action.

E. Defendant Robillard

Defendant Robillard argues that the only allegations against him in the complaint are either conclusory statements that he engaged in the conspiracy or concern activities that are protected by absolute immunity. *See* Dkt. No. 56-1. Plaintiff's memorandum in opposition, which is in large part identical to his opposition to Defendant O'Malley's motion, again focuses mainly on his fabrication of evidence claims. *See* Dkt. No. 71.

Plaintiff's complaint patently fails to allege that Defendant Robillard engaged in any actions in furtherance of the alleged conspiracy that are not covered by absolute immunity. Defendant Smith hired Defendant Robillard as the forensic document examiner to perform a comparison of handwriting samples from Plaintiff and LoPorto. Dkt. No. 1 at ¶¶ 880, 884. In his request for a handwriting comparison, Defendant Smith detailed the testimony against Plaintiff in a letter to Defendant Robillard. *See* Dkt. No. 1-1 at 35-37. Also, Defendant Ogden testified that he "talked to Robillard about the theory of prosecution and evidence" before he issued his report. Dkt. No. 1 at ¶ 1137. Defendant Robillard gave his expert testimony that it was Plaintiff's handwriting on nearly all of the falsified AABs. *Id.* at ¶ 897. He made these initial findings without comparing the handwriting of John Brown, Dan Brown, Defendant McGrath, or other suspects. *Id.* at ¶ 1145. Defendant Robillard was paid approximately $100,000 and was instructed by Defendant Smith to not conduct an ink analysis on several of the falsified AABs. *Id.* at ¶¶ 898, 902, 1152. Accordingly, the only alleged act undertaken by Defendant Robillard in this case was testifying in his expert opinion that it was Plaintiff's handwriting on the falsified AABs. Such testimony is clearly covered by absolute immunity and cannot form the basis for a § 1983 claim. *See, e.g., Elmasri v. England*, 222 F. Supp. 2d 212, 222 (E.D.N.Y. 2000) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)) ("This [absolute witness] immunity extends to all persons, whether governmental, expert, or lay witnesses, integral to the trial process").

To the extent that Plaintiff contends that any meetings between Defendant Smith or Ogden and Defendant Robillard are overt acts in furtherance of the conspiracy, these arguments are likewise unavailing. The alleged discussions and meetings between these Defendants were clearly in preparation for Defendant Robillard's testimony. Plaintiff alleges that Defendants Smith and Ogden informed Defendant Robillard of their theory of the case and instructed him to shape his testimony to meet this theory. *See* Dkt. No. 1 at ¶¶ 362, 890-95, 903. Such preparatory activity, even if preparing to present false testimony, is entitled to absolute immunity. *See Rehberg*, 132 S. Ct. at 1506-07; *Coggins*, 776 F.3d at 112. Further, to the extent that Plaintiff alleges that Defendant Robillard failed to conduct a sufficient examination of the handwriting, all of the allegations state that Defendant Smith instructed Defendant Robillard to not compare additional handwriting samples and to not conduct an ink analysis. *See* Dkt. No. 1 at ¶¶ 898, 902, 1145, 1152; *see also Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005) (citing *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976)) (noting that absolute immunity attaches to a prosecutor's decision to withhold exculpatory information). Accordingly, the Court finds that all of Defendant Robillard's alleged acts in furtherance of Plaintiff's malicious prosecution are protected by absolute immunity. Thus, Defendant Robillard's motion is granted, he is terminated from this action, and Plaintiff's claims against Defendant Robillard are dismissed.

F. Defendant McNally

1. Official Capacity

The Eleventh Amendment provides a state with sovereign immunity from suit. *See Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (citation omitted). "To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993) (citations omitted). Here, Plaintiff concedes that Defendant McNally is entitled to Eleventh Amendment immunity for the suit against him in his official capacity. *See* Dkt. No. 82 at 10. Accordingly, Plaintiff's claims against Defendant McNally in his official capacity are dismissed.

2. Individual Capacity

Defendant McNally argues that his decision to recuse himself as district attorney is entitled to absolute prosecutorial immunity and, even if no such immunity applies, Plaintiff has failed to sufficiently allege that Defendant McNally engaged in the conspiracy with Defendant Smith to continue the malicious prosecution against Plaintiff. *See* Dkt. No. 64-4.

The Second Circuit has not clearly established whether a district attorney's decision to recuse himself is entitled to absolute immunity. Plaintiff argues that the recusal decision is a purely administrative decision, which is not entitled to prosecutorial immunity. *See* Dkt. No. 82 at 11; *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 273

(1993) ("A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity"). Defendant McNally, on the other hand, argues that his decision to recuse himself is akin to the decision of whether or not to initiate a prosecution, which is afforded absolute immunity. *See* Dkt. No. 84 at 8; *see also Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989) (holding that absolute prosecutorial immunity extends to the decision to prosecute as well as the decision not to prosecute). The Court finds that a district attorney is entitled to absolute immunity for the act of recusing himself from a prosecution because such act is intimately tied to his functions as an advocate for the people. If a prosecutor could be personally liable for his decision to recuse himself from a case, it would open the possibility of having to decide between refusing to recuse, which could potentially taint the outcome of a case if a perceived conflict is present, and recusing one's self and potentially being subject to personal liability for this action. It would be contrary to the goals of the inherent advocacy in our judicial system to allow such decisions to be influenced by concerns of personal liability. The Second Circuit has extended absolute immunity to other, similar actions because of the same concern that potential personal liability should not influence important prosecutorial decisions. If a prosecutor is entitled to absolute immunity for choosing to prosecute an action, then it is logically extended that they should be entitled to absolute immunity for deciding to forego prosecution, as it would be improper for a prosecutor's decision on whether or

not to prosecute to be based upon concerns of potential personal liability. *Schloss*, 876 F.2d at 290. In a similar vein, a judge's decision to recuse himself is described as a judicial, rather than administrative, act that is entitled to absolute judicial immunity. *See Bobrowsky v. Yonkers Courthouse*, 777 F. Supp. 2d 692, 714 (S.D.N.Y. 2011). Moreover, at least one other circuit has held that a district attorney's decision to recuse himself is entitled to absolute prosecutorial immunity. *See Delta Fuel Co., Inc. v. Maxwell*, 485 Fed. Appx. 685, 686 (5th Cir. 2012) (per curium) (citing *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976)) ("[B]ecause the recusal was done in [the defendant's] role as district attorney, [the defendant] was entitled to absolute prosecutorial immunity"). To the extent that Plaintiff argues that Defendant McNally's recusal was illegal or improper, Justice Pulver of Rensselaer County Supreme Court so ordered Defendant McNally's recusal and appointed Defendant Smith to be acting special district attorney for the case, thereby affirming Defendant McNally's position that his recusal and Defendant Smith's appointment were legal actions sanctioned by the state supreme court. *See* Dkt. No. 99-55. Accordingly, Defendant McNally's decision to recuse himself from prosecuting the AB forgery case is entitled to absolute immunity and cannot serve as the basis for a § 1983 claim.

The actions that Defendant McNally took after he recused himself, however, are not entitled to absolute immunity. *See Kulwicki v. Dawson*, 969 F.2d 1454, 1467 (3d Cir. 1992) (holding that actions taken by a prosecutor after he had recused himself from the case were not entitled to absolute prosecutorial

immunity). Plaintiff alleges that "McNally also violated the rules of ethics and N.Y.S. Judiciary Law § 493 by giving legal advice to McInerney, McDonough and Martiniano, taking physical custody of AB documents and DNA reports related to the case and discussing the matter with Trey Smith subsequent to his unlawful self-disqualification." Dkt. No. 1 at ¶ 257. Plaintiff alleges that Defendant McNally's cell-phone records "will show he communicated with McInerney, Trey Smith and Chair Wade before and/or during the scapegoat prosecution." *Id.* at ¶ 220. Further, Defendant Smith admitted "that he and McNally talked about the AB forgery after McNally disqualified himself from the matter." *Id.* at ¶ 300. Defendant McNally allegedly advised Robert Martiniano to not inform the police or Defendant Smith that he had relevant knowledge about the AB forgery. *Id.* at ¶¶ 651-58.

The Court finds that Defendant McNally's act of dissuading Robert Martiniano from providing police with relevant testimony that would have allegedly exonerated Plaintiff was an overt act that allowed the continued malicious prosecution of Plaintiff. However, Plaintiff has not sufficiently alleged that Defendant McNally engaged in this act in furtherance of an agreement with Defendant Smith to scapegoat prosecute Plaintiff. While Plaintiff alleges that Defendant McNally knew that Martiniano had "personal knowledge of facts relevant to the AB forgery," *id.* at ¶ 651, Plaintiff does not contend that Defendant McNally knew that the information would have been exculpatory for Plaintiff. In fact, Plaintiff specifically states that Defendant McNally "gave that advice without having

any discussion with Martiniano about the facts of which he had knowledge." *Id.* at 656. Plaintiff contends that Defendants McInerney and John Brown admitted to Martiniano that they were forging ABs, however Plaintiff fails to allege that Defendant Smith or McNally knew the substance Martiniano's knowledge of the AB forgeries at the time Defendant McNally advised him not to talk to police. Thus, the overt act of discouraging Martiniano from talking with the police could not have been done for the purpose of furthering Plaintiff's malicious prosecution because Defendant McNally had no reason to know what Martiniano's cooperation with police might have uncovered.

The remaining allegations against Defendant McNally are likewise insufficient to support the assertion that he acted in agreement with Defendant Smith to further Plaintiff's malicious prosecution. While Defendants Smith and McNally undoubtedly talked about the AB forgery case and Defendant McNally had access to relevant evidence in the case, Plaintiff has only stated conclusory allegations that the meetings or conversations between the two were for the purpose of maliciously prosecuting Plaintiff. Mere communications between an individual and a prosecutor, without more concrete allegations of wrongdoing, are insufficient to state a malicious prosecution conspiracy claim. Defendant McNally's continued contact with Defendant Smith after recusing himself from the prosecution, while not advised given the potential appearance of impropriety, does not necessarily indicate a conspiratorial agreement. Plaintiff's repeated conclusory allegations that these meetings were for

the purpose of continuing the prosecution against Plaintiff do not give legitimacy to otherwise insufficient allegations. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002) (quotation omitted) ("[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct"). Accordingly, the Court finds that Plaintiff has failed to sufficiently allege that Defendant McNally agreed with Defendant Smith, either implicitly or explicitly, to maliciously prosecute Plaintiff. Defendant McNally's motion is granted in its entirety and he is terminated from this action.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions, and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant McInerney's motion to dismiss (Dkt. No. 12) is **GRANTED** in part and **DENIED** in part as stated herein;[5] and the Court further

ORDERS that Defendants John and Daniel Brown's motion to dismiss (Dkt. No. 40) is **GRANTED** in its entirety; and the Court further

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[5] Plaintiff's § 1983 conspiracy to commit malicious prosecution claim against Defendant McInerney survives the instant motion. Plaintiff's fabrication of evidence and *Monell* liability claims against Defendant McInerney are dismissed.

ORDERS that Defendant O'Malley's motion to dismiss (Dkt. No. 50) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendant Robillard's motion to dismiss (Dkt. No. 56) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendant McNally's motion to dismiss (Dkt. No. 64) is **GRANTED** in its entirety; and the Court further

ORDERS that Plaintiff's fabrication of evidence claims are **DISMISSED** as against all Defendants on statute of limitations grounds; and the Court further

ORDERS that Defendants John and Daniel Brown, O'Malley, Robillard, and McNally are terminated from this action; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: September 30, 2016.
Albany, New York

Mae A. D'Agostino
Mae A. D'Agostino
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

No. 1:15-cv-01505
(MAD/DJS)

EDWARD G. MCDONOUGH,

Plaintiff,

v.

YOUEL C. SMITH, III, individually and as Special District Attorney for the County of Rensselaer, New York, a/k/a TREY SMITH, KEVIN B. MCGRATH; WILLIAM A. MCINERNEY; JOHN J. OGDEN; ANTHONY J. RENNA; THE COUNTY OF RENSSELAER, NEW YORK,

Defendants.

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Mae A. D'Agostini, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Edward G. McDonough ("Plaintiff") commenced this action by filing a 174 page, 1220 paragraph complaint on December 18, 2015, asserting three causes of action pursuant to 42 U.S.C. § 1983 ("Section 1983") against eleven named Defendants. *See* Dkt. No. 1. In a Memorandum-Decision and Order dated September 30, 2016 (the "Prior Decision"), this Court dismissed Plaintiff's claims against Defendants O'Malley, Robillard, McNally, and John and Daniel Brown. *See* Dkt. No. 114. The Court dismissed all of Plaintiff's claims against Defendant McInerney except for Plaintiff's

Section 1983 conspiracy to commit malicious prosecution claim. *See id.* at 51.

Before the Court dismissed Plaintiff's claims against Defendants John and Daniel Brown, those Defendants moved for sanctions against Plaintiff and his attorney pursuant to Federal Rule of Civil Procedure 11(c). *See* Dkt. No. 89. Plaintiff then cross-moved for sanctions against Defendants John and Daniel Brown and their attorney. *See* Dkt. No. 90.

Currently before the Court are three motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), filed separately by Defendants Smith, Ogden, and the County of Rensselaer (the "County"). *See* Dkt. Nos. 73, 96, 97. Also before the Court are Defendants John and Daniel Brown's motion for sanctions and Plaintiff's cross-motion for sanctions. *See* Dkt. Nos. 89, 90.

II. BACKGROUND[1]

The Court refers the parties to the Prior Decision, which extensively sets forth the factual background and allegations in Plaintiff's complaint. *See* Dkt. No. 114. Accordingly, the Court will provide a brief recitation of the facts and discuss only those allegations that are relevant to disposition of the pending motions.

Defendant Youel C. Smith III, also known as Trey Smith ("Defendant Smith"), was appointed special district attorney of Rensselaer County to prosecute alleged absentee ballot forgeries in the 2009 Troy

[1] The following factual background is taken from Plaintiff's complaint. Any statements contained herein are treated merely as allegations and not as statements of fact.

City elections. *See* Dkt. No. 1 ¶¶ 24-25. Defendant John J. Ogden ("Defendant Ogden") is employed by the New York State Police ("NYSP") and was assigned to assist Defendant Smith in investigating the forgery scheme. *See id.* ¶ 323.

The general allegations in this case surround an alleged scheme to forge and submit false applications for absentee ballots ("AAB") and then file the subsequently forged absentee ballots ("AB"). An AAB is a simple, single-page document that must be signed and completed by the voter or his agent before it can be filed with the Board of Elections. *See id.* ¶ 101. Once an AAB is completed, signed, and filed, an AB and an AB envelope are mailed to the voter or to the voter's AB agent, if one is designated. *Id.* ¶ 102. The AABs require the voter to list a reason for why he or she is eligible to vote absentee ("excuses"). *See id.* ¶ 2.

In the summer of 2009, Defendant Kevin McGrath announced that he was running to take Democratic control of the Working Family Party line for the City of Troy elections. *Id.* ¶ 51. Defendant McGrath and other democratic operatives, including Defendants William McInerney, John Brown, and Daniel Brown, had voters sign AABs without completing the remainder of the form, and then these Defendants completed the AABs with false AB names and excuses, filed them, and obtained the AB for those voters. *See id.* ¶¶ 51-56, 81-88. After receiving the ABs, these Defendants falsely voted with the ABs in forged AB envelopes. *See id.* ¶¶ 56, 80.

Around September of 2009, the forgery scheme was discovered and an action was commenced to invalidate the forged ABs. *See id.* ¶¶ 161-65, 180.

Shortly thereafter, Defendant Richard J. McNally, who was employed as the district attorney of Rensselaer County, disqualified his office from investigating or prosecuting any case related to the AB forgery, and Defendant Smith was appointed as special prosecutor for any further criminal action related to the 2009 AB forgery scheme. *See id.* ¶¶ 27, 229. Plaintiff alleges that Defendant Smith had ample evidence to prosecute other democratic operatives for the 2009 AB forgery scheme, but instead actively conspired to initiate a scapegoat prosecution against Plaintiff in order to shift the negative attention and criminal charges away from the other Defendants. *See id.* ¶¶ 343-45.

As outlined in the Prior Decision, the alleged inadequacies of Defendant Smith's investigation into the other Defendants for the AB forgery include the following: (1) the photograph shown to voters to identify Defendant McInerney was a twenty-year-old photograph, which did not accurately reflect his current appearance; (2) photographs of Defendants John Brown, Daniel Brown, and other democratic operatives were not shown to voters; (3) several key democratic party operatives, including Defendant Renna and Robert Martiniano, were not interviewed for the investigation; (4) certain witnesses were not specifically asked questions about Defendant McInerney's involvement in the AB forgery; (5) the forged AB documents purportedly signed by Defendant McInerney were not examined by a handwriting expert; (6) when presented with significant evidence that Defendant McInerney had participated in AB fraud in the 2007 and 2008 elections, Defendant Smith stated that he did not

have authority to prosecute those actions. *See id.* ¶¶ 364-380, 400, 487, 492-500. Moreover, from 2009 through 2011, Defendant Smith told officials in the NYSP that Defendants McInerney and John Brown could not be prosecuted because the evidence against them "was not legally sufficient to corroborate the testimony of DeFiglio or any accomplice or co-conspirator. . . ." *Id.* ¶ 573.

In September of 2010, Defendant Smith commenced a grand jury proceeding against Plaintiff. *Id.* ¶ 708. Plaintiff alleges that Defendant Smith conspired with several Defendants to present false testimony that implicated Plaintiff instead of the democratic operatives who were actually guilty. *See id.* ¶¶ 740-43, 758-62. Moreover, Defendant Smith prepared and notarized the affidavits of those individuals who did not testify. *Id.* ¶ 815. At trial, two of those voters testified that the signature on their purported affidavit was not genuine. *Id.* ¶ 816; *see also* Dkt. No. 1-1 at 26-30.

On January 28, 2011, Plaintiff was charged by indictment with 38 counts of felony forgery in the second degree and 36 counts of felony criminal possession of a forged instrument in the second degree. *See* Dkt. No. 1 ¶ 809. In April of 2011, Plaintiff contacted the U.S. attorney's office and requested an FBI investigation into his allegedly unlawful prosecution. *See id.* ¶ 929. Between May 25 and August 4, 2011, the NYSP conducted an independent investigation into this matter. *See id.* ¶ 944. That investigation gathered sufficient evidence against Defendant McInerney for the forgery of approximately 50 of the AABs that appeared to be forged in his handwriting. *See id.*

¶ 947. Defendant McInerney was subsequently arrested for the AB forgeries that occurred in 2007 and 2008. *See id.* ¶ 993. Defendant McInerney also pled guilty to one felony count and was sentenced to a 90 day work order in satisfaction of all charges relating to his involvement in the 2009 AB forgery scheme. *See id.* ¶ 971. Plaintiff was ultimately acquitted on December 21, 2012. *See id.* ¶¶ 1199-1200.

Plaintiff alleges that Defendants Smith and Ogden maliciously prosecuted him and also engaged in a conspiracy with other Defendants to effectuate Plaintiff's malicious prosecution. Plaintiff further alleges that the County should also be held liable for Defendants Smith's and McNally's actions. Defendants Smith, Ogden, and the County have moved to dismiss the complaint.

III. DISCUSSION

A. Standard of Review

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to

the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting [*Twombly*, 550 U.S.] at 557, 127 S. Ct. 1955). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *Twombly*, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed[,]" *id.* at 570.

B. General Arguments

While the three Defendants each separately moved to dismiss the complaint on numerous grounds,

several of the arguments are not specific to any individual Defendant. As such, the Court will address those arguments before addressing any Defendant-specific arguments.

1. Rule 8

Each Defendant claims that Plaintiff's 174 page, 1220 paragraph complaint violates the requirement in Fed. R. Civ. P. 8 that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Court addressed this argument in the Prior Decision and found that, while Plaintiff's complaint is undoubtedly a voluminous pleading, it spans almost a four-year period and implicates eleven Defendants and numerous other individuals. Moreover, each Defendant who has responded has been able to understand Plaintiff's allegations enough to present colorable arguments and defenses in opposition. As such, Plaintiff's complaint complies with Rule 8, and Defendants Smith's, Ogden's, and the County's motions to dismiss are denied on this ground. However, it should be noted that the length of Plaintiff's complaint, coupled with the lack of coherent, organized claims, has made analysis of these motions difficult.

2. Statute of Limitations

In the Prior Decision, the Court held that Count I of Plaintiff's complaint alleging a Section 1983 fabrication of evidence claim is barred by the statute of limitations. *See* Dkt. No. 114 at 26. As such, the Court dismissed that claim against all Defendants. *See id.* However, the Court held that Plaintiff's malicious prosecution claim was timely. *See id.* at

22. As such, Plaintiff's remaining claims that the Court will consider in the present motion are Count II (Section 1983 malicious prosecution and conspiracy to commit malicious protection) and Count III (Section 1983 *Monell* claim against the County). *See* Dkt. No. 1 ¶¶ 1214-20.

C. Malicious Prosecution

1. Legal Standard

"The Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person—i.e., the right to be free of unreasonable or unwanted restraints on personal liberty." *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995). The elements of malicious prosecution under Section 1983 effectively mirror the elements of the same claim under New York law. *See Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (citations omitted). Accordingly, to state a cause of action for malicious prosecution in New York, the plaintiff must allege "(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003) (quotation omitted).

"Probable cause, in the context of malicious prosecution, has . . . been described as such facts and circumstances as would lead a reasonably prudent person to believe the plaintiff guilty." *Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013) (quoting *Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir.

2003)). Courts look at the "totality of the circumstances" to determine if probable cause exists. *See id.* at 89. "[T]he existence of probable cause is a complete defense to a claim of malicious prosecution in New York." *Manganiello v. City of New York*, 612 F.3d 149, 161-62 (2d Cir. 2010) (quoting *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003)). "Probable cause may . . . exist where the officer has relied on mistaken information, so long as it was reasonable for him to rely on it. However, 'the failure to make a further inquiry when a reasonable person would have done so may be evidence of lack of probable cause.'" *Id.* at 161 (quoting *Colon v. City of New York*, 60 N.Y.2d 78, 82 (1983)) (internal citation omitted). Moreover, "indictment by a grand jury creates a presumption of probable cause that may *only* be rebutted by evidence that the indictment was procured by 'fraud, perjury, the suppression of evidence or other [official] conduct undertaken in bad faith.'" *Savino*, 331 F.3d at 72 (quoting *Colon*, 60 N.Y.2d at 83). Finally, the lack of probable cause alone "generally creates an inference of malice." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 131 (2d Cir. 1997).

To sustain a malicious prosecution claim under Section 1983, "the state law elements must be met, and there must also be a showing of a 'sufficient post-arraignment liberty restraint ') implicate the plaintiff's Fourth Amendment rights.'" *Rutigliano v. City of New York*, 326 Fed. Appx. 5, 8-9 (2d. Cir. 2009) (quotation omitted). As the Second Circuit has stated,

> The Fourth Amendment right implicated in a malicious prosecution action is the right to be

> free of unreasonable seizure of the person—i.e., the right to be free of unreasonable or unwarranted restrains on personal liberty. A plaintiff asserting a Fourth Amendment malicious prosecution claim under § 1983 must therefore show some deprivation of liberty consistent with the concept of "seizure."

Rohman v. N.Y.C. Transit Auth., 215 F.3d 208, 215 (2d Cir. 2000) (quoting *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995)). Thus, a plaintiff pursuing a malicious prosecution claim "under § 1983 must show that the seizure resulted from the initiation or pendency of judicial proceedings." *Id.*

2. Defendant Smith[2]

At the outset, Defendant Smith is entitled to Eleventh Amendment immunity for all claims against him in his official capacity. The Eleventh Amendment provides a state with sovereign immunity from suit. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (citation omitted). "To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993) (citations omitted). Here, since Plaintiff sued Defendant Smith for damages in his official capacity, that is deemed to be a suit against the

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[2] The Court will not consider the self-serving affidavit or additional evidence that Defendant Smith submitted with this motion *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

state, and Defendant Smith is entitled to Eleventh Amendment immunity. The Court notes that Defendant Smith did not raise this defense in his motion to dismiss, but "lower courts may raise the issue of Eleventh Amendment immunity sua sponte." *Woods v. Rondout Valley Central School Dist. Bd of Educ.*, 466 F.3d 232, 238 (2d Cir. 2006). Accordingly, all claims against Defendant Smith in his official capacity are dismissed.

With respect to Defendant Smith's individual liability, Plaintiff clearly pleads the first two elements of a malicious prosecution claim. Defendant Smith commenced a grand jury proceeding against Plaintiff in September of 2010. *See* Dkt. No. 1 ¶ 708. Plaintiff was indicted and charged with 74 felony counts and then arrested on January 28, 2011. *See id.* ¶¶ 2, 1199. Defendant Smith continued the prosecution of Plaintiff in the Rensselaer County Supreme Court until Plaintiff was ultimately acquitted of all charges on December 21, 2012. *See id.* ¶¶ 1190, 1200; *see also Phillips v. DeAngelis*, 571 F. Supp. 2d 347, 353 (N.D.N.Y. 2008) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997)) ("The requirement that a plaintiff show an initiation or continuation of a criminal proceeding by the defendant may be satisfied by a showing that the defendants filed formal charges and caused the plaintiff to be arraigned").

Turning to the third element, Defendant Smith claims that he had probable cause to commence the proceeding, and that Plaintiff has not sufficiently rebutted the presumption of probable cause created by a grand jury indictment. *See* Dkt. No. 96-2 at 9-12. The Court held in the Prior Decision that

Plaintiff has sufficiently rebutted the presumption of probable cause that a grand jury indictment creates. *See* Dkt. No. 114 at 28. The Court noted that Plaintiff's indictment was based, in part, upon affidavits from voters who claimed that their AABs had been falsified, which were prepared and notarized by Defendant Smith. *See id.*; Dkt. No. 1 ¶¶ 813, 815. At trial, two of the voters whose affidavits were presented at the grand jury proceeding allegedly testified that the signature on their purported affidavits was not genuine. *See* Dkt. No. 114 at 28; Dkt. No. 1 ¶ 816; *see also* Dkt. No. 1-1 at 26-30. The Court also noted the alleged false testimony of Defendant Ogden, who testified that the forged AABs were all falsified by the same person, but later admitted that his testimony was not correct. *See* Dkt. No. 114 at 28. The Court further noted that Defendant O'Malley first testified that he wrote excuses on several AABs, which he testified probably came from the AB candidate who got the information from a democratic committee operative. *See id.*; Dkt. No. 1 ¶ 772. Plaintiff alleges that Defendant Smith called Defendant O'Malley at his home and encouraged him to change his testimony and instead testify that Plaintiff directed him to make up excuses and write them on the AABs. *See* Dkt. No. 114 at 28; Dkt. No. 1 ¶¶ 783-84. Defendant O'Malley allegedly changed his testimony in this manner. *See* Dkt. No. 1 ¶ 783. The Court held that based on these allegations of forgery, untruthful testimony, and suppression of evidence, Plaintiff has sufficiently rebutted the presumption of probable cause that a grand jury indictment creates. *See Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir. 2003) ("The presumption is rebuttable, and may be

overcome by evidence establishing that the police witnesses 'have not made a complete and full statement of facts . . . that they have misrepresented or falsified evidence . . . or otherwise acted in bad faith.'") (quoting *Colon v. City of New York*, 60 N.Y.2d 78, 82 (1983)).

Although Plaintiff has rebutted the presumption of probable cause, he still must sufficiently allege that Defendant Smith lacked probable cause to commence the proceeding. Plaintiff alleges that, through Defendant Smith's investigation, he had sufficient evidence to prosecute Defendants McGrath, McInerney, John Brown, and Anthony DeFiglio for the AB forgery. *See* Dkt. No. 1 ¶¶ 335, 337. Specifically, Defendant Smith allegedly obtained numerous AB forged documents and the testimony of more than fifty witnesses, many of whom implicated Defendant McInerney in the forgery scheme. *Id.* ¶ 336. Plaintiff alleges that Mr. DeFiglio "admitted to Trey Smith and Ogden in October or November 2009 that the 2009 AB forgery was committed principally by McInerney and Brown and that [democratic candidates and operatives] had engaged in the same AB forgery scheme . . . for at least the prior 25 years. . . ." *Id.* ¶ 107. Plaintiff further alleges that Defendant Smith knew that Defendant McGrath was implicated in the forgery scheme based on the inconsistencies between Defendant McGrath's claims and the information provided by voters. *Id.* ¶¶ 624-26. For example, Marc Welch, a voter, claimed that Defendant McGrath had him sign an AAB, but Marc Welch ended up voting in person instead, even though an AB was filed on his behalf. *See id.* ¶ 624(e). Likewise, John Gilbert, a voter,

claimed that he did not sign an AAB, but Defendant McGrath claimed that Mr. Gilbert gave him permission to vote his AB. *See id.* ¶ 624(c). Plaintiff alleges several other examples of inconsistences that seemingly implicated Defendant McGrath. *See id.* ¶ 624. Moreover, Plaintiff alleges that in November of 2010, Rensselaer County Board of Elections Commissioner Lawrence Bugbee ("Commissioner Bugbee") provided Defendant Smith with twenty AABs filed in 2007 and 2008 that had been forged in the same unique handwriting, which Commissioner Bugbee allegedly identified as Defendant McInerney's handwriting. *See id.* ¶¶ 491-93. Commissioner Bugbee also allegedly told Defendant Smith that the 2009 AB documents were also forged by Defendants McInerney and McGrath. *See id.* ¶ 490.

Rather than follow this evidence, Defendant Smith allegedly targeted Plaintiff for the forgery case. Plaintiff alleges that Defendant Smith told Defendants McInerney and John Brown that they would not be prosecuted for the AB forgery. *See id.* ¶ 266. From 2009 through 2011, Defendant Smith allegedly told officials in the NYSP that Defendants McInerney and John Brown could not be prosecuted because the evidence against them "was not legally sufficient to corroborate the testimony of DeFiglio or any accomplice or co-conspirator. . . ." *Id.* ¶ 573. Plaintiff alleges that during the investigation of the AB fraud, Defendant Smith had officers in the NYSP show voters a picture of Defendant McInerney that was over twenty years old and that did not accurately depict his physical appearance at that time. *Id.* ¶ 364. As such, voters could not identify

the perpetrator as Defendant McInerney. *Id.* ¶ 365. Moreover, Plaintiff alleges that Defendant Smith did not depose any other employee of the Rensselaer County Board of Elections "because it would have required [Defendant] O'Malley to give a false statement in furtherance of the conspiratorial prosecution and exposed the scheme at that time." *Id.* ¶ 451. Plaintiff further alleges that Defendant Smith did not perform a "relatively quick and inexpensive ink analysis" on the fourteen AABs that were filed on September 10, 2009 "because this evidence alone would have exonerated [Plaintiff], disproved the prosecution theory and proved the falsity of the testimony of [Defendants] Robillard, Ogden, and McGrath." *Id.* ¶ 902.

Overall, Plaintiff contends that Defendant Smith

> pretentiously adopted and pursued a preposterous prosecution theory he knew was wrong; buried crucial testimony of DeFiglio and other witnesses; did not seek readily available evidence or the truthful cooperation of any perpetrator; accepted the self-serving incredible false assertions of many suspects implicated in the crimes; immunized or gave extraordinary favorable cooperation agreements to many suspects implicated in the crimes; purposely ignored material evidence; and fabricated false evidence against McDonough.

Id. ¶ 345.

In response, Defendant Smith argues that he had probable cause to commence the proceeding. *See* Dkt. No. 96-2 at 11. However, in his memorandum of law, Defendant Smith largely cites to material

outside of the complaint to support his assertion that he had probable cause. *See id.* The Court will not consider such material at the motion to dismiss stage.[3] *See Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000).

Plaintiff alleges that the only evidence Defendant Smith had to prosecute Plaintiff was an accusation by Defendant McGrath that was proven false, *see* Dkt. No. 1 ¶¶ 620-24, 714, a purported conversation between Defendant Smith and John Brown about AB agent names, *see id.* ¶ 714, and the finding of Plaintiff's DNA on three envelopes that contained forged ABs, *see id.* Plaintiff claims that Defendant Smith knew that Defendant McGrath's accusation was proven false by the voter affidavits and AB documents. *See id.* ¶¶ 623-24. With respect to the DNA finding, Plaintiff claims that his DNA was not found on the envelopes until after Defendant Smith proposed new extraction methods to be performed in the presence of Defendants Smith and Ogden. *See id.* ¶¶ 694, 697. Plaintiff further claims that he

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[3] Specifically, Defendant Smith relies on a sworn statement given by Defendant McGrath to the NYSP and the grand jury testimony of several witnesses. *See* Dkt. No. 96-2 at 11-12. When ruling on a motion to dismiss, a court may consider "documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, [and] documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint." *See Knox v. Countrywide Bank*, 4 F. Supp. 3d 499, 513 (E.D.N.Y. 2014) (citing *Nasso v. Bio Reference Labs., Inc.*, 892 F Supp. 2d 439, 446 (E.D.N.Y. 2012)). Here, these documents are not "integral" to the complaint, nor is there any indication that Plaintiff relied on them in drafting his complaint. As such, the Court will not consider them at the motion to dismiss stage.

recalled helping Defendant Renna file two AABs and insert the AB into envelopes, but that he did not falsely vote or forge any AB envelopes. *See id.* ¶¶ 699-701. Although Plaintiff's DNA was found on three of the envelopes, considering Plaintiff's allegations that his DNA was not found until after Defendant Smith arrived at the crime lab and proposed new extraction methods, coupled with Plaintiff's theory that Defendant Smith fabricated other evidence and influenced testimony to implicate Plaintiff, the Court finds that the DNA results alone did not give Defendant Smith probable cause to prosecute Plaintiff.

The Court notes that, based on the exhibits in Plaintiff's complaint, Defendant Smith also had a statement from Anthony DeFiglio, a former clerk for the City of Troy Housing Authority, that possibly implicated Plaintiff. Mr. DeFiglio claimed that, with respect to the AB forgery scheme, "I know that there is no possible way that the Democratic Commissioner of the [Board of Elections], [Plaintiff], could not have known what was happening." Dkt. No. 1-1 at 12. This statement was given on November 6, 2009, before Defendant Smith commenced any proceedings against Plaintiff. *See id.* However, this is the only statement made by Mr. DeFiglio pertaining to Plaintiff, and appears to be merely speculative and provides no specific evidence against Plaintiff. Moreover, Plaintiff has sufficiently alleged that Defendants Smith and Ogden asked Mr. DeFiglio pointed questions in an attempt to implicate Plaintiff and not other democratic operatives. *See* Dkt. No. 1 ¶¶ 536-42. Plaintiff has also alleged that Mr. DeFiglio disclosed to Defendant Smith that

Defendant McInerney was largely involved in the AB fraud, but Defendant Smith ignored that evidence. *See id.* ¶¶ 546-53. As such, Mr. DeFiglio's conclusory statement potentially implicating Plaintiff did not give Defendant Smith probable cause.

Considering Plaintiff's numerous specific allegations that Defendant Smith targeted Plaintiff despite ample evidence implicating other Defendants and political operatives, the Court finds that, considering the totality of the circumstances, Plaintiff has sufficiently alleged that Defendant Smith lacked probable cause to prosecute Plaintiff.

Turning to the fourth element, "[a] lack of probable cause generally creates an inference of malice." *Boyd*, 336 F.3d at 78 (citing *Ricciuti*, 124 F.3d at 131). As discussed above, Plaintiff's allegations that Defendant Smith initiated a "scapegoat prosecution" against Plaintiff to shield other political candidates from prosecution are sufficient to satisfy the malice requirement.

Plaintiff must also allege a "sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights." *Rutigliano v. City of New York*, 326 Fed. Appx. 5, 8-9 (2d. Cir. 2009) (quoting *Rohman v. N.Y.C. Transit Auth.*, 215 F.3d 208, 215 (2d Cir. 2000)). The Court found in the Prior Decision that Plaintiff met this element. *See* Dkt. No. 114 at 29-30. The Court noted that Plaintiff was required to endure two separate trials and was not acquitted of the charges against him until nearly two years until after he was indicted. *See* Dkt. No. 1 ¶¶ 1199-1200. These allegations clearly state that Plaintiff suffered a restraint on his liberty that extended beyond the arraignment itself. *See*

Rohman, 215 F.3d at 216 (holding that a plaintiff who was required "to return to court on at least five occasions before the charges against him were ultimately dropped[,]" coupled with the fact that a New York criminal defendant released on his own recognizance "must 'render himself at all times amenable to the orders and processes of the court,'" was sufficient to allege a post-arraignment liberty restraint).

Accordingly, the Court finds that Plaintiff has sufficiently alleged facts to support a Section 1983 malicious prosecution claim against Defendant Smith.

3. Absolute Prosecutorial Immunity

Defendant Smith argues that he is entitled to absolute prosecutorial immunity that cannot be compromised by general allegations of fraud and conspiracy. *See* Dkt. No. 96-2 at 13-14. Defendant Smith asserts that "plaintiff's conclusory and extravagant allegations of conspiracy is [sic] merely a device . . . to circumvent [Defendant Smith's] entitlement to absolute immunity on each of plaintiff's claims." *Id.*

"Prosecutors are entitled to absolute immunity when they engage in activities 'intimately associated with the judicial phase of the criminal process,' *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), and done 'in the course of [their] role as . . . advocate[s] for the State,' *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)." *Kent v.Cardone*, 404 Fed. Appx. 540, 542 (2d Cir. 2011). The Second Circuit uses a "functional approach" to determine whether an action is prosecutorial, which considers "the nature of the function performed, not the identify of the

actor who performed it." *Id.* (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991)). The Supreme Court has provided the following guidance to determine whether an action is prosecutorial:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other. Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.

Kalina v. Fletcher, 522 U.S. 118, 126 (1997) (citations and internal quotation marks omitted). As such, a prosecutor receives absolute immunity for acts done as an advocate, while acts done in an investigatory capacity are entitled to only qualified immunity. *See Zahrey v. Coffey*, 221 F.3d 342, 346-47 (2d Cir. 2000).

As the Second Circuit has stated, "[t]he line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw." *Id.* at 347 (citing *Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir. 1995)). The Supreme Court has heard several cases on this distinction between a prosecutor's role as advocate and investigator, and

has held that absolute immunity applies when a prosecutor appears and presents evidence at a probable cause hearing, *see Burns*, 500 U.S. at 492, and when a prosecutor prepares and files charging documents, *see Kalina*, 522 U.S. at 129. The Supreme Court has held that absolute immunity does not apply when a prosecutor gives legal advice to police officers, *see Burns*, 500 U.S. at 492-94, when a prosecutor makes statements to the media, *see Buckley*, 509 U.S. at 277-78, and when a prosecutor acts as a complaining witness to satisfy probable cause for a warrant application, *see Kalina*, 522 U.S. at 129-31. The Second Circuit has also noted that "[t]he majority opinion in [*Buckley*] suggests that a prosecutor's conduct prior to the establishment of probable cause should be considered investigative: '[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.'" *Zahrey*, 221 F.3d at 347 n.2 (quoting *Buckley*, 509 U.S. at 274).

The Second Circuit has also drawn a further distinction with respect to investigative acts:

> [T]he pre-litigation function that a prosecutor performs has at least two aspects: (1) the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution, and (2) the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order. While both of these categories of activities occur before the commencement of formal legal proceedings, and therefore may be loosely

> termed "investigative," we believe that the first category consists of actions that are of a police nature and are not entitled to absolute protection.

Barbera v. Smith, 836 F.2d 96, 100-01 (2d Cir. 1987) (citations omitted).

Alleging that a prosecutor acted in a conspiracy to deprive a plaintiff certain rights does not remove absolute immunity protection that the prosecutor receives. *Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1148 (2d Cir. 1995). The Second Circuit has explained that "[t]he fact that such a conspiracy is certainly not something that is *properly* within the role of a prosecutor is immaterial, because 'the immunity attaches to his function, not to the manner in which he performed it.'" *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (quoting *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986)). Moreover, the Second Circuit has held that an absolute immunity defense can often be resolved at the motion to dismiss stage because the defense depends on the nature of the function being performed by the defendant, which "is often clear from the face of the complaint." *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (citations omitted).

Since the initiation of a prosecution is an essential element of a malicious prosecution claim, and since prosecutors have absolute immunity for actions taken in their role as advocates, prosecutors generally have absolute immunity from malicious prosecution claims. *See id.* at 237 ("Because the immunity attaches to the official prosecutorial function, *see, e.g.*, *Imbler*, 424 U.S. at 430, 96 S. Ct. 984, and because the initiation and pursuit of a

criminal prosecution are quintessential prosecutorial functions, *see id.*, the prosecutor has absolute immunity for the initiation and conduct of a prosecution 'unless [he] proceeds in the clear absence of all jurisdiction.'") (quoting *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987)); *Del Col v. Rice*, No. 11 CV 5138, 2012 WL 6589839, *5 (E.D.N.Y. Dec. 18, 2012) (" '[I]t is well-established in the Second Circuit that claims of malicious prosecution' relate to a prosecutors' role as an advocate; and, thus, prosecutors are absolutely immune from malicious prosecution claims.") (quoting *McKeon v. Daley*, 101 F. Supp. 2d 79, 87 (N.D.N.Y. 2000)), *aff'd*, 8 Fed. Appx. 138 (2d Cir. 2001). In the present matter, unless Defendant Smith acted in clear absence of all jurisdiction, he is absolutely immune from Plaintiff's malicious prosecution claim. Plaintiff argues that Defendant Smith's appointment was invalid, but Plaintiff has provided no argument that this Court has subject matter jurisdiction over those claims.[4]

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[4] Plaintiff asserts that, since Defendant Smith's appointment as special prosecutor was unlawful and invalid, Defendant Smith had no legal authority to prosecute Plaintiff. *See* Dkt. No. 1 ¶¶ 229-35; Dkt. No. 108 at 14-16. On September 28, 2009, Judge Robert M. Jacon of the Rensselaer County Court executed an order appointing Defendant Smith as special prosecutor. *See* Dkt. No. 1 ¶ 232; Dkt. No. 99-3 at 2. It appears from the complaint that Plaintiff moved to disqualify Defendant Smith in 2011 but Defendant Smith successfully opposed Plaintiff's motion. *See* Dkt. No. 1 ¶¶ 859-60. It is not entirely clear how Plaintiff attempted to disqualify Defendant Smith, but to the extent that Plaintiff lost in state court and is now attempting to relitigate that case in federal court, those claims are barred by the *Rooker-Feldman* doctrine. *See Exxon Mobile Corp., v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005) (holding that federal courts do not have jurisdiction to hear "cases brought by state-court losers complaining of injuries

Moreover, to the extent that Plaintiff argues that Defendant Smith acted in the absence of jurisdiction because he knew that Plaintiff was innocent but still continued the prosecution, the Second Circuit has rejected that argument. *See Shmueli*, 424 F.3d at 238-39. Accordingly, since Defendant Smith is entitled to absolute immunity, his motion to dismiss Plaintiff's malicious prosecution claim is granted.

Defendant Smith is also entitled to absolute immunity from Plaintiff's conspiracy to commit malicious prosecution claim. "[I]t is also well established that absolute prosecutorial immunity extends to conspiracy allegations." *Covington v. City of New York*, 916 F. Supp. 282, 287 (S.D.N.Y. 1996). Since Defendant Smith has absolute immunity from Plaintiff's malicious prosecution claim, he is also immune from Plaintiff's conspiracy to commit malicious prosecution claim. *See Pinaud*, 52 F.3d at 1148 ("As this Court and other circuits have repeatedly held, since absolute immunity covers 'virtually all acts, regardless of motion,

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caused by state-court judgments rendered before the district court proceeding commenced and inviting district court review and rejection of those judgments"). Moreover, Plaintiff relies on *Working Families Party v. Fisher*, 23 N.Y.3d 539 (2014) to support the merits of his claim, but in that case, the New York Court of Appeals held that a N.Y.C.P.L.R. Article 78 proceeding was an appropriate remedy to void the improper appointment of a special prosecutor. *See Working Families Party v. Fisher*, 23 N.Y.3d 539, 544 (2014) Here, it appears that Plaintiff's claims regarding Defendant Smith's appointment are merely an attempt to appeal a state-court order or relitigate a state-court proceeding, and Plaintiff has provided no argument that this Court has jurisdiction to hear those claims. As such, the Court will not entertain Plaintiff's claims that Defendant Smith's appointment was invalid.

associated with [the prosecutor's] function as an advocate,' [*Dory*, 25 F.3d at 83], when the underlying activity at issue is covered by absolute immunity, the 'plaintiff derives no benefit from alleging a conspiracy.'") (quoting *Hill*, 45 F.3d at 659 n.2); *Rehberg v. Paulk*, 611 F.3d 828, 854 (11th Cir. 2010) ("A prosecutor cannot be liable for 'conspiracy' to violate a defendant's constitutional rights by prosecuting him if the prosecutor also is immune from liability for actually prosecuting the defendant.") (citation omitted); *Reasonover v. St. Louis Cty., Mo.*, 447 F.3d 569, 580 (8th Cir. 2006) ("[A] prosecutor is absolutely immune from a civil conspiracy charge when his alleged participation in the conspiracy consists of otherwise immune acts.") (citation omitted). Accordingly, to the extent that Plaintiff alleges a conspiracy to commit malicious prosecution claim against Defendant Smith, that claim is dismissed.

The Court acknowledges that Plaintiff has sufficiently alleged that some of Defendant Smith's actions were taken in an investigative role, and thus would not be entitled to absolute immunity. Plaintiff alleges that Defendant Smith instructed the NYSP investigators to show voters a twenty-year-old photograph of Defendant McInerney so that voters would not be able to identify him as the individual who had them sign their AABs. *See* Dkt. No. 1 ¶¶ 364-65. Plaintiff also alleges that Defendant Smith never showed voters photographs of Defendants John and Daniel Brown or any other democratic operative allegedly involved in the fraud. *See id.* ¶ 366. Likewise, before Defendant Smith commenced a grand jury proceeding, he allegedly did

not hire a law enforcement forensic document examiner or handwriting expert to analyze the AABs in fear that a handwriting analysis would exonerate Plaintiff. *See id.* ¶¶ 667-70. These actions were all taken before Plaintiff's indictment and before Defendant Smith had probable cause to prosecute Plaintiff. As the Supreme Court has stated, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274.

Moreover, Plaintiff alleges that Defendant Smith misled the NYSP investigators into believing that Defendants McInerney, John Brown, and Renna could not be prosecuted in an attempt to thwart any investigation of those Defendants. *See* Dkt. No. 1 ¶¶ 350, 576. Plaintiff claims that, once Senior Investigator O'Brien of the NYSP initiated an independent investigation into the AB fraud, Defendants Smith and Ogden orchestrated a false personnel complaint against O'Brien in an effort to quash the independent investigation. *See id.* ¶¶ 1067-69. Plaintiff also alleges that Defendant Smith attempted to influence the FBI investigation by leaking the name of the FBI agent conducting the investigation to impair his ability to talk to witnesses and suspects. *See id.* ¶¶ 934-37.

However, as discussed above, the distinction between a prosecutor's investigative and prosecutorial functions is immaterial with respect to a malicious prosecution claim, since prosecutors are generally immune from such claims. If Plaintiff's fabrication of evidence claim was timely, or if Plaintiff asserted other claims against Defendant Smith that did not involve his role as an advocate,

then the distinction between investigative and prosecutorial acts would be relevant. Since Plaintiff's only remaining claim is for malicious prosecution and since Defendant Smith has absolute immunity from that claim, Defendant Smith is hereby dismissed from this action.

4. Defendant Ogden

Plaintiff has failed to allege that Defendant Ogden is directly responsible for his malicious prosecution. Plaintiff alleges that Defendant Smith was the one who initiated the prosecution of Plaintiff. *See* Dkt. No. 1 ¶¶ 322-23, 708. A police officer may be found liable for malicious prosecution if he "continued" the prosecution of a plaintiff, but "[o]nce control of a prosecution has passed to a prosecuting attorney, a police officer may only be liable for 'continuing' the prosecution if he or she '[insists] upon or [urges] further prosecution.'" *Burt v. Aleman*, No. 05-CV-4493, 2008 WL 1927371, *5 (E.D.N.Y. Apr. 30, 2008) (quoting *Dirienzo v. United States*, 690 F. Supp. 1149, 1158 (D. Conn. 1988)). Plaintiff alleges that Defendant Smith was in control of the prosecution and much of the investigation, and that Defendant Smith initiated and directed the alleged scapegoat prosecution of Plaintiff. Defendant Smith became involved in the investigation several weeks before Defendant Ogden did. *See* Dkt. No. 1 ¶¶ 322-23. Although Plaintiff claims that Defendants Smith and Ogden worked closely together during the investigation, many of Defendant Ogden's actions were taken alongside Defendant Smith or at the behest of Defendant Smith. For example, Plaintiff alleges that Defendant Smith directed Defendant Ogden to interview Plaintiff and take written

depositions several times. *See* Dkt. No. 1 ¶¶ 472-73. Plaintiff further alleges that Defendant Ogden's grand jury testimony was fabricated in conspiracy with Defendant Smith. *See id.* ¶¶ 758-61. However, Plaintiff does not allege that Defendant Ogden was the one insisting or urging Defendant Smith to continue the prosecution.

Moreover, Defendant Ogden is entitled to absolute immunity for his grand jury and trial testimony. *See Coggins v. Cnty. of Nassau*, 988 F. Supp. 2d 231, 244 (E.D.N.Y. 2013) (citing *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983)). Of course, a grand jury witness does not receive absolute immunity for all actions arising out of the substance testified about. *See Coggins v. Buonora*, 776 F.3d 108, 112-13 (2d Cir. 2015). In *Coggins*, the Second Circuit held that a plaintiff may state a valid malicious prosecution claim against a grand jury witness, even with absolute immunity for the testimony given in such proceeding, if the plaintiff alleges actions taken in excess of that witness' testimony that would amount to an independent Section 1983 claim. *Id.* at 113. However, in the present matter, Plaintiff has not stated a valid malicious prosecution claim against Defendant Ogden.

The Court notes that Defendant Ogden did not raise an absolute immunity defense, but Plaintiff himself acknowledges that Defendant Ogden is entitled to absolute immunity for his testimony. *See* Dkt. No. 86 at 9. Instead, Plaintiff argues that Defendant Ogden should be liable for his investigative acts performed "outside the judicial process." *See id.* at 14. As discussed above, the Court has considered the actions taken by Defendant

Ogden outside of his testimony, and Plaintiff has not sufficiently alleged a malicious prosecution claim against him.

Accordingly, to the extent that Plaintiff's complaint contains a direct cause of action for malicious prosecution against Defendant Ogden, any such claim is dismissed.

D. Section 1983 Conspiracy

1. Legal Standard

Plaintiff alleges that Defendants Ogden and Smith conspired to maliciously prosecute Plaintiff. *See* Dkt. No. 1 ¶ 1215. To state a Section 1983 conspiracy claim, the complaint must allege "(1) an agreement between two or more state actors or between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999) (citing *Carson v. Lewis*, 35 F. Supp. 2d 250, 271 (E.D.N.Y. 1999)). Thus, a plaintiff must first allege sufficient facts to support an underlying constitutional violation in order to state a valid Section 1983 conspiracy claim. *See Curley v. Vill. of Suffern*, 268 F.3d 65, 72 (2d Cir. 2001). Moreover, "[w]hile 'conclusory allegations' of a § 1983 conspiracy are insufficient, we have recognized that such 'conspiracies are by their very nature secretive operations,' and may have to be proven by circumstantial, rather than direct, evidence." *Pangburn*, 200 F.3d at 72 (quoting *Dwares v. City of New York*, 985 F.2d 94, 99-100 (2d Cir. 1993); *Rounseville v. Zahl*, 13 F.3d 625, 632 (2d Cir. 1994)).

In the instant case, the alleged unconstitutional injury implicated by the conspiracy is based on a claim of malicious prosecution. As discussed above, Plaintiff has adequately pled facts to support a malicious prosecution claim. However, Plaintiff has only alleged that Defendant Smith is directly responsible for Plaintiff's malicious prosecution, and Defendant Smith is entitled to absolute immunity from that claim. As such, the Court is faced with the question of whether Plaintiff can sustain a Section 1983 conspiracy claim based on his alleged constitutional violation even though the underlying Section 1983 claim itself fails due to absolute immunity. In other words, the question is whether Defendants Ogden and McInerney, who are not protected by absolute immunity from Plaintiff's malicious prosecution claim, can be held liable for conspiring with Defendant Smith, who is protected by absolute immunity, even though the underlying claim has been dismissed on immunity grounds.

Courts generally dismiss Section 1983 conspiracy claims when the underlying Section 1983 claim is dismissed. The reason for this is that "a civil conspiracy claim 'does not set forth an independent cause of action' but rather is 'sustainable only after an underlying . . . claim has been established.'" *DeMartino v. New York State Department of Labor*, 177 F. Supp. 3d 342, 373 (E.D.N.Y. 2016) (quoting *Clark v. City of Oswego*, No. 03-CV-202, 2007 WL 925724, *7 (N.D.N.Y. Mar. 26, 2007)) (alteration omitted). Most cases that have dismissed Section 1983 conspiracy claims dismiss them because the plaintiff failed to sufficiently establish a constitutional violation. *See, e.g., id.*; *Curley*, 268

F.3d at 72 ("Since plaintiff cannot establish a claim for false arrest or the use of excessive force, he may not maintain a § 1983 cause of action for conspiracy.") (citation omitted); *Mitchell v. County of Nassau*, 768 F. Supp. 2d 545, 561-64 (E.D.N.Y. 2011) ("However, a § 1983 conspiracy claim fails as a matter of law where there is no underlying constitutional violation.") (citations omitted); *Tirse v. Gilbo*, 6:15-CV-0987, 2016 WL 4046780, *18 (N.D.N.Y. July 27, 2016) (dismissing the plaintiff's Section 1983 conspiracy claims after finding that the plaintiff failed to sufficiently allege the underlying Section 1983 claims) (citations omitted). The present case is distinguishable because Plaintiff has sufficiently alleged that he suffered a constitutional violation, but the only Defendant directly responsible for that violation is shielded by immunity.

In *Dennis v. Sparks*, 449 U.S. 24 (1980), the Supreme Court held that private parties can still be liable for a Section 1983 conspiracy claim for conspiring with a judge, even though judges are entitled to absolute immunity. *See Dennis v. Sparks*, 449 U.S. 24, 28-29 (1980). Although that case does not directly answer the question in this context of whether a plaintiff can sustain a Section 1983 conspiracy claim when the underlying claims have been dismissed on immunity grounds, other courts relying on *Dennis* have concluded that such conspiracy claims should not be dismissed. In a Southern District of New York case involving a conspiracy claim against a judge entitled to immunity, the district court originally dismissed all of the plaintiff's claims, including the plaintiff's Section 1983 conspiracy claim. *See Carvel v. New*

York State, No. 08 Civ. 3305, 2010 WL 1404154, *1 (S.D.N.Y. Apr. 6, 2010) (explaining that the court originally dismissed all of the plaintiff's claims). However, the Second Circuit, in a summary order citing *Dennis*, held that the plaintiff could still sustain a Section 1983 conspiracy claim against the other defendants even though the judge was entitled to immunity, and thus remanded the case for the district court to consider only the plaintiff's Section 1983 conspiracy claim. *See Carvel v. New York*, 369 Fed. Appx. 269, 270 (2d Cir. 2010). Although the district court ultimately dismissed that case due to the plaintiff's failure to sufficiently allege a conspiracy claim, the clear implication from that case is that a plaintiff may assert a Section 1983 conspiracy claim even if the underlying claims have been dismissed on immunity grounds. *See Carvel v. Scarpino*, No. 08 Civ. 3305, 2010 WL 5174392, *7-10 (S.D.N.Y. Dec. 16, 2010). Likewise, in *Douglas v. New York State Adirondack Park Agency*, 895 F. Supp. 2d 321 (N.D.N.Y. 2012), the district court faced the question of whether private parties can be liable for conspiring with a prosecutor to maliciously prosecute the plaintiff. *See Douglas v. New York State Adirondack Park Agency*, 895 F. Supp. 2d 321, 359 n.27 (N.D.N.Y. 2012). The court, relying on *Dennis*, concluded that the prosecutor's immunity did not bar the liability of a co-conspirator with respect to the malicious prosecution claim. *See id.* Although the plaintiff in that case sufficiently alleged other constitutional violations such that the underlying Section 1983 claims were not dismissed, that case held that a prosecutor's immunity should not also shield co-

conspirators from a malicious prosecution claim. *See id.*

Moreover, the Court notes that the elements for a conspiracy claim do not require that an underlying Section 1983 claim exist—only that the state actors enter into an agreement to inflict an unconstitutional injury, and an overt act in furtherance of that agreement causing damages. *Pangburn*, 200 F.3d at 72. As discussed above, normally in a conspiracy case an underlying Section 1983 claim exists, but in this case, Plaintiff has sufficiently alleged an unconstitutional injury despite the dismissal of Plaintiff's underlying Section 1983 claim. Considering that Plaintiff has sufficiently alleged a constitutional violation, the Court finds that it is possible for Plaintiff to sufficiently allege a Section 1983 conspiracy to commit malicious prosecution claim, even though the underlying claim has been dismissed on immunity grounds. Concluding otherwise would result in Defendant Smith's prosecutorial immunity also shielding Defendants Ogden and McInerney from liability on Plaintiff's conspiracy claims, even though those Defendants did not act in a prosecutorial role.

Turning to the merits of Plaintiff's Section 1983 conspiracy claim against Defendant Ogden, Plaintiff sufficiently alleges that Defendants Smith and Ogden conspired together in the alleged malicious prosecution of Plaintiff. At the outset, both Defendant Smith—a special prosecutor, and Defendant Ogden—a NYSP investigator, are state actors for the purposes of this claim. Plaintiff alleges a number of overt acts committed by both Defendants in furtherance of Plaintiff's prosecution.

According to the complaint, Defendant Smith admitted that Defendant Ogden had been "working on [the] case with [him] for two years," at "every step of the way," and that Defendant Smith considered them "to basically be one entity working together." Dkt. No. 1 ¶ 331. Plaintiff has also attached to his complaint several e-mails between Defendants Smith and Ogden discussing the case and the theories of prosecution. *See* Dkt. No. 1-1 at 21-24.

Plaintiff alleges that Defendant Ogden assisted Defendant Smith in interviewing witnesses, where they asked only pointed questions in an attempt to implicate Plaintiff, but failed to ask questions that would implicate other democratic operatives. *See* Dkt. No. 1 ¶¶ 514, 536-42. Plaintiff alleges that, at Defendant Smith's Direction, Defendant Ogden interviewed Plaintiff at the NYSP station, but did not ask questions about the filing of the AABs that would possibly implicate Defendants McGrath, Brown, Renna, or McInerney. *See id.* ¶¶ 472-73. Likewise, Plaintiff claims that Defendants Smith and Ogden obtained enough evidence to convict certain democratic operatives, including affidavits from voters that clearly implicated Defendant McGrath, but buried that evidence and offered immunity to those democratic operatives. *See id.* ¶¶ 349, 624-26. Plaintiff further alleges that Defendant Ogden agreed with Defendant Smith's decision to not obtain an ink analysis on certain AABs in fear that an ink analysis would exonerate Plaintiff. *See id.* ¶ 902. Moreover, Plaintiff alleges that Defendant Ogden was also aware of Commissioner Bugbee's claim that Defendant McInerney was guilty of the AB forgeries from 2007

and 2008, but Defendants Ogden and Smith ignored this evidence in their investigation of the 2009 forgeries. *See id.* ¶¶ 488-98.

Further, Plaintiff claims that Defendant Ogden completed an affidavit alleging that "the AB forgery was committed in conspiracy by McGrath, Brown, McInerney and others, including [Plaintiff]." *Id.* ¶ 710. This affidavit was the basis for Defendant Smith getting a DNA analysis of the forged AB envelopes. *Id.* Defendant Ogden also allegedly assisted Defendant Smith in orchestrating a "false personnel complaint and/or departmental charges to be made against" senior investigator O'Brien, in order to impede O'Brien's independent investigation into the AB forgeries. *See id.* ¶¶ 1067-69. This complaint was orchestrated after Plaintiff's indictment, and presumably in an attempt to thwart O'Brien's investigation so that Defendant Smith could continue to prosecute Plaintiff. *See id.* ¶¶ 944, 1067-69. Although some of these alleged actions were taken early on in the investigation, Plaintiff sufficiently alleges that Defendants Smith and Ogden prevented other investigators from discovering the actual perpetrators of the AB forgery scheme, which led to Plaintiff's alleged malicious prosecution.

In sum, Plaintiff has sufficiently alleged that Defendant Ogden acted in concert with Defendant Smith to maliciously prosecute Plaintiff. Plaintiff alleges that both Defendants worked closely together and consistently ignored or failed to obtain evidence that incriminated other Defendants in an effort to initiate and continue Plaintiff's prosecution. Thus, Plaintiff has sufficiently stated a Section 1983

conspiracy to commit malicious prosecution claim against Defendant Ogden.

E. County of Rensselaer

Count III of Plaintiff's complaint alleges a Section 1983 *Monell* claim against the County. *See* Dkt. No. 1 ¶¶ 1219-20. Plaintiff alleges that "Defendant County violated the plaintiff's rights and caused him said deprivations through its policymaking acts . . . as alleged herein." *Id.* ¶ 1220. In response, the County argues that Defendants Smith and McNally are not County actors or policymakers. *See* Dkt. No. 95 at 13-20. The County further argues that Plaintiff has not sufficiently alleged facts that establish municipal liability.[5] *See id.* at 11-13.

"Although municipalities are within the ambit of section 1983, municipal liability does not attach for actions undertaken by city employees under a theory of *respondeat superior*." *Birdsall v. City of Hartford*,

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[5] In opposition to the County's motion, Plaintiff submitted a twenty-five page memorandum of law, but also attached a twenty-one page exhibit (Exhibit A) and other documents which are effectively additional memoranda of law. *See* Dkt. No. 115-1. The County argues that this filing violates Local Rule 7.1, which provides that "[n]o party shall file or serve a memorandum of law that exceeds twenty-five (25) pages in length, unless that party obtains leave of the judge hearing the motion prior to filing." N.D.N.Y. Local Rule 7.1. In the Prior Decision, the Court noted that Plaintiff had exceeded the page limit requirements set forth in the Local Rules, and ordered Plaintiff to strictly abide by the page limit requirements henceforth. Plaintiff filed this response with the attached exhibits after the Prior Decision was issued. Since the filing of these exhibits (which are effectively memoranda of law) is in violation of Rule 7.1, the Court will not consider them in deciding the present motion.

249 F. Supp. 2d 163, 173 (D. Conn. 2003) (citing *Monell v. New York City Dep't of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978)). Despite the fact that *respondeat superior* liability does not lie, a municipal entity or employee sued in his or her official capacity can be held accountable for a constitutional violation which has occurred pursuant to "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers . . . [or] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 690-91. Such municipal liability can be established in a case such as this in several different ways, including through proof of an officially adopted rule or a widespread, informal custom demonstrating "a deliberate government policy or failing to train or supervise its officers." *Bruker v. City of New York*, 337 F. Supp. 2d 539, 556 (S.D.N.Y. 2004) (quoting *Anthony v. City of New York*, 339 F.3d 129, 140 (2d Cir. 2003)). A plaintiff may also show that the allegedly unconstitutional action was "taken or caused by an official whose actions represent an official policy," or that municipal officers have acquiesced in or condoned a known policy, custom, or practice. *See Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000), *cert. denied sub nom., County of Schenectady v. Jeffes*, 531 U.S. 813 (2000); *see also Wenger v. Canastota Cent. Sch. Dist.*, No. 5:95-CV-1081, 2004 WL 726007, *3 (N.D.N.Y. Apr. 5, 2004).

When a governmental official is sued in his official capacity, "a governmental entity is liable under Section 1983 only when the entity itself is a moving

force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (internal citations and quotation marks omitted). A municipal policy may be established by the single act giving rise to a plaintiff's claims if it was "committed by a city official 'responsible for establishing final policy with respect to the subject matter in question,' and . . . represent[ed] a deliberate and considered choice among competing alternatives." *Hall v. Town of Brighton*, No. 13-CV-6155, 2014 WL 340106, *5 (W.D.N.Y. Jan. 30, 2014) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality opinion)). When a plaintiff attempts to prove municipal liability "by a city employee's single tortious decision or course of action, the inquiry focuses on whether the actions of the employee in question may be said to represent the conscious choices of the municipality itself." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004) (citing *Pembaur*, 475 U.S. at 481-82). Thus, the single unconstitutional act of an official with "final policymaking authority" can subject a municipality to liability under Section 1983. *Pembaur*, 475 U.S. at 483.

Whether a municipal employee has "'final policymaking authority' is a question of state law" to be decided by the court. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (quoting *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1998)). Such a determination is made by "[r]eviewing the relevant legal materials, including state and local positive law, as well as "'custom or usage" having the force of

law.'" *Id.* (quoting *Praprotnik*, 485 U.S. at 124 n.1). Importantly, "the official in question need not be a municipal policymaker for all purposes. Rather, with respect to the conduct challenged, he must be 'responsible under state law for making policy *in that area* of the [municipality's] business.'" *Barnes*, 208 F.3d at 57 (quoting *Praprotnik*, 485 U.S. at 123) (other citations omitted). Further, the "official policy" standard "refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembauer*, 475 U.S. at 480-81. Thus, the actions of an officer who does not have explicit policymaking authority may, nonetheless, constitute "official policy" if his decisions are accepted as the binding and ordinary course of conduct by the authorized policymakers. *See Praprotnik*, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final").

Moreover, a county cannot be held liable for the acts of a district attorney related to decisions to prosecute or not prosecute an individual because the district attorney represents the state and not the county. *See Martin v. County of Suffolk*, No. 13-CV-2104, 2014 WL 1232906, *5 (E.D.N.Y. Mar. 26, 2014) (citations omitted); *see also Pinaud v. County of Suffolk*, 52 F.3d 1139, 1154 n.15 (2d Cir. 1995). However, a county can be held liable based upon its "long history of negligent disciplinary practices regarding law enforcement personnel, which gave

rise to the individual defendants' conduct in promoting the malicious prosecution of plaintiffs." *Myers v. Cnty. of Orange*, 157 F.3d 66, 77 (2d Cir. 1998) (quotation omitted).

In the present matter, Plaintiff has failed to allege facts that establish municipal liability. Many of Defendant Smith's actions were related to his decision whether to prosecute certain individuals, and a county cannot be held liable for those decisions. *See Martin*, 2014 WL 1232906, at *5. Moreover, Plaintiff merely makes conclusory allegations that Defendants Smith and McNally acted as policymakers for the County. Plaintiff alleges that Defendant Smith's actions "constituted an unlawful policy decision" and that Defendants Smith and McNally are "policy-making officials," but Plaintiff provides no specific allegations that Defendants Smith or McNally are responsible for making policy for the County. *See* Dkt. No. 1 ¶¶ 1185, 1194. Likewise, Plaintiff has not alleged that the County has a long history of negligent practices that gave rise to Plaintiff's prosecution or that Defendant Smith's actions were the binding and ordinary course of conduct of the County. The Court also notes that Defendant Smith was appointed as special prosecutor for the limited purpose of investigating and prosecuting the AB forgery case, and there are no allegations that Defendant Smith acted in a more substantial role with respect to the County. Accordingly, the County's motion to dismiss is granted in its entirety, and the County is dismissed as a Defendant in this action.

F. Motions for Sanctions

Defendants John and Daniel Brown moved for sanctions against Plaintiff and his attorney pursuant to Federal Rule of Civil Procedure 11, *see* Dkt. No. 89, and Plaintiff cross-moved for sanctions against the Brown Defendants and their attorney, *see* Dkt. No. 90.

The central objective behind Rule 11 is the deterrence of "baseless filings in district courts." *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). "Drawing a line between zealous advocacy and frivolous conduct, Rule 11 provides a vehicle for sanctioning an attorney, a client, or both." *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 948 F.2d 1338, 1343 (2d Cir. 1991). Specifically, Rule 11 provides as follows:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have

> evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). "[T]he standard for triggering the award of fees under Rule 11 is objective unreasonableness." *Margo v. Weiss*, 213 F.3d 55, 65 (2d Cir. 2000) (citing *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1469-70 (2d Cir. 1988)).

In analyzing a motion for sanctions pursuant to Rule 11, the district court is required to "avoid hindsight and resolve all doubts in favor of the signer." *See Carrasquillo v. City of Troy*, No. 1:02–CV–01231, 2006 WL 304031, *4 (N.D.N.Y. Feb. 8, 2006) (citing *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986)). The imposition of sanctions upon a party is a discretionary decision for the district court, and must be exercised with caution. *See Cerrone v. Cahill*, No. 95-CV-241, 2001 WL 1217186, *16 (N.D.N.Y. Sept. 28, 2001) (citing *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994)). Accordingly, Rule 11 is violated only when "it is patently clear that a claim has absolutely no chance of success." *Carrasquillo*, 2006 WL 304031, at *4 (internal citations omitted).

There are certain procedural rules a party must follow when making a motion for sanctions. "[A] party moving for Rule 11 sanctions must do so in a filing 'made separately from any other motion.'" *Lawrence v. Richman Grp. of CT LLC*, 620 F.3d 153, 156 (2d Cir. 2010); *see also* Fed. R. Civ. P. 11(c)(2).

"Rule 11's safe harbor provision provides an opportunity to withdraw or correct a challenged submission by requiring initial service of the motion, but delays filing or presentation of the motion to the court for 21 days; filing of the motion is permitted 21 days after service only if the challenged submission is not 'withdrawn or appropriately corrected.'" *In Re Pennie & Edmonds LLP*, 323 F.3d 86, 89 (2d Cir. 2003) (quotation omitted). The purpose of the safe harbor provision is to "permit sanctions to be imposed on a party who has violated Rule 11(b) only after that party is provided with notice of the pleading defect and afforded an opportunity to correct or withdraw the defective filing." *Lawrence*, 620 F.3d at 159.

Defendants John and Daniel Brown argue that sanctions against Plaintiff are appropriate because Plaintiff failed to realize that both Brown Defendants have absolute immunity from suit for testifying and for their meetings with the prosecutor before testifying. *See* Dkt. No. 89-1 at 6. As such, they claim that Plaintiff's complaint is frivolous. *See id.* at 10. They further argue that Plaintiff filed his complaint for the improper purpose of harassing Defendants and increasing their litigation costs. *See id.*

The Court finds that sanctions against Plaintiff and his counsel are inappropriate in this case. Although the Court did ultimately dismiss Plaintiff's claims against Defendants John and Daniel Brown in the Prior Decision, it cannot be said that Plaintiff's claims against them were frivolous. *See* Dkt. No. 114 at 39-43. As the Court noted in the Prior Decision, Plaintiff alleged that John Brown

gave a sworn, written deposition wherein he fabricated incidents that occurred in Plaintiff's office and implicated Plaintiff in the forgery scheme. *See* Dkt. No. 1 ¶¶ 1057-58. The complaint also contains allegations that Defendant Smith met with John Brown before he issued this statement to ensure that it was consistent with the other Defendants' sworn testimony. *Id.* ¶ 1061. The Court concluded that, although this statement did not receive absolute immunity, Plaintiff had not sufficiently alleged that John Brown had an agreement with Defendant Smith to maliciously prosecute Plaintiff. *See* Dkt. No. 114 at 41. The Court found that Plaintiff's allegations against John Brown were conclusory and that John Brown's alleged link to the malicious prosecution was more tenuous than certain other Defendants. Even though Plaintiff did not sufficiently state a cause of action against John Brown, his claims were not frivolous. Plaintiff sufficiently alleged that John Brown was not entitled to absolute immunity for his written statement, and Plaintiff also alleged, albeit in a conclusory fashion, that John Brown played a role in Plaintiff's malicious prosecution. As such, sanctions are not appropriate for Plaintiff's claims against John Brown.

Plaintiff alleges that Defendant Daniel Brown likely possessed and filed certain forged AABs, and then gave false testimony about them before a grand jury. *See* Dkt. No. 1 ¶¶ 1131-34. Plaintiff argued that Daniel Brown was not entitled to absolute immunity because he was a "complaining witness." *See* Dkt. No. 60 at 63-64. In the Prior Decision, the Court found that Daniel Brown was not a "complaining witness" because he was not involved

in the investigation until after Plaintiff had been indicted, and, therefore, he is entitled to absolute immunity for his testimony. *See* Dkt. No. 114 at 42. As such, the Court dismissed Plaintiff's claims against Daniel Brown. In resolving all doubts in Plaintiff's favor, the Court finds that Plaintiff's claims against Daniel Brown were not frivolous. Considering Plaintiff's numerous allegations that various Defendants conspired to present false testimony that would implicate Plaintiff, coupled with Plaintiff's claim that Daniel Brown likely filed forged AABs and then falsely testified about them, the Court finds that Plaintiff's claims against Daniel Brown were not frivolous. To be sure, Plaintiff has not sufficiently alleged that Daniel Brown was involved in the alleged conspiracy to scapegoat prosecute Plaintiff. However, in resolving all doubts in favor of Plaintiff and in light of Plaintiff's allegations that Daniel Brown was working with several Defendants who were involved in the alleged malicious prosecution of Plaintiff, although it may be a close call, it cannot be said that Plaintiff's claims against Daniel Brown were frivolous. However, even if Plaintiff's claims against Daniel Brown can be considered frivolous, in its discretion, the Court declines to impose sanctions on Plaintiff or his attorney.

Plaintiff also cross-moved for sanctions against Defendants John and Daniel Brown, arguing that their motion for sanctions is frivolous and presented only to harass Plaintiff. *See* Dkt. No. 90 at 10. At the outset, there is no indication that their motion was presented to harass Plaintiff or increase Plaintiff's litigation costs. Moreover, in resolving all

doubts in the Brown Defendants' favor, their motion for sanctions is not frivolous. In their motion, the Brown Defendants argue that Plaintiff's claims against them were frivolous. The Court dismissed Plaintiff's claims against both Brown Defendants in the Prior Decision. With respect to Daniel Brown, since his testimony is entitled to absolute immunity and Plaintiff did not sufficiently allege that he acted in conspiracy with the other Defendants, Plaintiff's claims against him, although not frivolous, were well short of the pleading requirements. As such, it was not unreasonable for Daniel Brown to argue that Plaintiff's claims against him were frivolous, especially since Daniel Brown's testimony was shielded by absolute immunity. With respect to John Brown, his testimony was also entitled to absolute immunity, and although he issued a written statement that is not shielded by immunity, Plaintiff failed to sufficiently allege that he was involved in the conspiracy to maliciously prosecute Plaintiff. Again, although the Court finds that Plaintiff's claims against John Brown were not frivolous, it was not objectively unreasonable for John Brown to argue that Plaintiff's claims against him were frivolous. As such, the Court will not impose sanctions on Defendants John and Daniel Brown or their attorney.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions, and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant Smith's motion to dismiss (Dkt. No. 96) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendant Ogden's motion to dismiss (Dkt. No. 73) is **GRANTED** in part and **DENIED** in part as stated herein;[6] and the Court further

ORDERS that Defendant County of Rensselaer's motion to dismiss (Dkt. No. 97) is **GRANTED** in its entirety; and the Court further

ORDERS that Defendants Smith and the County of Rensselaer are terminated from this action; and the Court further

ORDERS that Defendants John and Daniel Brown's motion for sanctions (Dkt. No. 89) is **DENIED**; and the Court further

ORDERS that Plaintiff's cross-motion for sanctions (Dkt. No. 90) is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: December 30, 2016.

Albany, New York

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[6] Plaintiff's Section 1983 conspiracy to commit malicious prosecution claim against Defendant Ogden survives the instant motion. All other claims against Defendant Ogden are dismissed.

Mae A. D'Agostino

Mae A. D'Agostino
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 17-296

EDWARD G. MCDONOUGH,

Plaintiff-Appellant,

v.

Youel Smith, individually and as Special District Attorney for the County of Rensselaer, New York, AKA Trey Smith,

Defendant-Appellees,

John J. Ogden, Richard McNally Jr., Kevin McGrath, Alan Robillard, County of Rensselaer, John F. Brown, William A. McInerney, Kevin F. O'Malley, Daniel B. Brown, Anthony J. Renna,

Defendants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of September, two thousand eighteen.

ORDER

Appellant, Edward G. McDonough, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the

appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

No. 18-485

In The
Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, Individually and as Special District Attorney for the County of Rensselaer, New York, aka TREY SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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ARGUMENT

POINT I

THE SECOND CIRCUIT'S ANALYTICAL FRAMEWORK TO DETERMINE THE ACCRUAL OF PLAINTIFF'S DUE PROCESS FABRICATION OF EVIDENCE CLAIM WAS PROPER

The Petition for Certiorari asserts that the Second Circuit, in its August 3, 2018 Decision, failed to identify the right at issue, then compare that right to the most analogous tort at common law. (Pet. 23-24; 26). This is not the case. The Circuit Court pointedly identified the right, arising from the Fifth and Fourteenth Amendments' Due Process Clauses, "not to be deprived of liberty as a result of the fabrication of evidence by a government officer. . . ." (Pet. App. 10a). The Circuit Court also concluded that this due process claim "is different from a malicious prosecution claim." *Id.* at 8a, explaining:

> Because the injury for this constitutional violation occurs at the time the evidence is used against the defendant to deprive him of his liberty, whether it be at the time he is arrested, faces trial or is convicted, it is when he becomes aware of that tainted evidence and its improper use that the harm is complete and the cause of action accrues. **Indeed, the harm – and the due process violation – is in the use of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding.** (Emphasis supplied).

> We thus conclude that under the circumstances here, the §1983 action based on fabrication of evidence occurred when McDonough (1) learned of the fabrication of the evidence and its use against him in criminal proceedings, and (2) was deprived of a liberty interest by his arrest and trial. For McDonough, this was, at the earliest, when he was indicted and arrested and, at the latest, by the end of his first trial, after all of the prosecutor's evidence had been presented. **"[J]udicial verification that the defendants' acts were wrongful" is not required, and thus accrual did not have to await McDonough's acquittal.** (Emphasis supplied).
>
> In contrast, we have long held that malicious prosecution claims brought pursuant to §1983 do not accrue until the underlying criminal proceedings against the plaintiff terminate in his favor. *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010). **Favorable termination is an element of malicious prosecution under New York law and also for the Constitutional-based tort. *Id.* A plaintiff therefore cannot have a complete cause of action unless and until the criminal proceedings against him terminate favorably.** (Emphasis supplied).

Under the traditional federal rule of accrual, "the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not

then known or predictable." *Wallace v. Kato*, 549 U.S. 384, 391 (2007). See also *Clark v. Iowa City*, 87 U.S. 583, 859 (1897); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *Bay Area Laundry and Dry-Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 201 (1997); *Singleton v. City of N.Y.*, 632 F.2d 185, 191 (2 Cir. 1980); *Veal v. Geraci*, 23 F.3d 722, 724-725 (2 Cir. 1994).

Thus, the Second Circuit properly concluded, in accordance with the traditional federal accrual rule, that the plaintiff's due process fabrication of evidence claim was not analogous to a §1983 malicious prosecution claim since "absence of probable cause" and "favorable determination," integral to the §1983 malicious prosecution claim, are not prerequisites to a due process fabrication of evidence claim. See *Garnett v. Undercover Officer C39*, 838 F.3d 265, 278-280 (2 Cir. 2016); *Ricciuti v. N.Y. City Trans. Auth.*, 124 F.3d 123, 130-131 (2 Cir. 1997); and *Rentas v. Ruffin*, 816 F.3d 214, 224-225 (2 Cir. 2016). The two are discrete claims and accrue at different times. *Id*.

POINT II

THE SECOND CIRCUIT'S ACCRUAL RULE WILL NOT PREJUDICE A CRIMINAL DEFENDANT

The petitioner expresses concern that the application of the traditional federal rule of accrual to discrete §1983 claims will burden and potentially prejudice the criminal defendant and create a potential for conflicting civil and criminal judgments. (Pet. 5-6). We submit

petitioner's concern is overstated. This issue has been uniformly addressed by the Supreme Court and the Second Circuit.

In *Wallace v. Kato*, 549 U.S. 384 (2007), the Supreme Court affirmed the Seventh Circuit's holding that where an arrest is followed by criminal proceedings, a §1983 claim for false arrest accrues when the claimant becomes detained pursuant to legal process. *Id.* at 389-390. The petitioner in *Wallace* contended that, under *Heck v. Humphrey*, 512 U.S. 477 (1994), his claim did not accrue until the state dropped the charges against him. *Id.* at 392. This Court rejected this argument, stating:

> What petitioner seeks . . . is an adoption of a principle that goes well beyond *Heck*: that an action which would impugn *an anticipated future conviction* cannot be brought until that conviction occurs and is set aside. The impracticality of such a rule should be obvious.

Id. at 393.

The Court also addressed the petitioner's concern for prejudice and/or conflicting civil and criminal judgments:

> If a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil

> action until the criminal case or the likelihood of a criminal case has ended.

Id. at 393-394.

Significantly, the Second Circuit adopted this approach prior to *Wallace*. See *Singleton v. City of N.Y.*, 632 F.2d 185, 193 (2 Cir. 1980) and *Mack v. Varelas*, 835 F.2d 995, 999-1000 (2 Cir. 1987); see also *Smith v. Campbell*, 782 F.3d 393, 394-396 (2 Cir. 2015). There is, in short, no evidence of any untoward effects from the prudential approach to this issue.

POINT III

PLAINTIFF'S §1983 DUE PROCESS CLAIM IS NOT A CONTINUING TORT

The Second Circuit rejected petitioner's argument that his prosecution constituted a "continuing violation." (Pet. App. 16a-17a). Petitioner contends this was error, citing Justice Ginsberg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266, 280 (1994); and the Seventh Circuit's decision in *Manuel v. City of Joliet*, 903 F.3d 667, 669 (7 Cir. 2018) (Pet. 22). We respectfully submit that the Second Circuit's determination of this issue is correct and conforms with this Court's jurisprudence. As the Court observed, through Justice Scalia, in *Wallace v. Kato*, 549 U.S. 384, 391 (2007):

> Under the traditional rule of accrual . . . the tort cause of action accrues, and the statute of limitation commences to run, when the wrongful act or omission results in damages. **The cause of action accrues even though**